
Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd [2011] FCA 131 (22 February 2011)

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FEDERAL COURT OF AUSTRALIA

Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd [2011] FCA 131

Citation:	**Uganda Telecom Limited** v Hi-Tech Telecom Pty Ltd [2011] FCA 131
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:	22 February 2011
Catchwords:	**ARBITRATION** – international arbitration – enforcement of foreign award – whether an award made in Uganda pursuant to an arbitration agreement contained in a telecommunications contract between a Ugandan corporation and an Australian corporation should be enforced in Australia – arbitrator proceeded *ex parte* – no reason not to enforce the award – consideration of grounds for refusing to enforce a foreign award under the *International Arbitration Act 1974* (Cth)

Legislation:	*Corporations Act 2001* (Cth) *International Arbitration Act 1974* (Cth), ss 2D, 3, 8, 39, 40, Pt II and Schedule 1 *International Arbitration Act Amendment Act 2010,* Schedule 1 *Arbitration and Conciliation Act Cap 4 Laws of Uganda, 2000 Revised Edition*, Pt VI, ss 1, 2, 3, 8, 10, 11, 12, 13, 14, 15, 19, 20, 21, 25, 31, 32, 35, 67 and 68 *Federal Court Rules*, O 29 r 2(a)
Cases cited:	*Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; (2004) 183 FLR 317 cited *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2004] USCA5 66; 364 F 3d 274 (5th Cir 2004) followed *Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier* [1974] USCA2 836; 508 F 2d 969 (2d Cir 1974) followed *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 cited
Date of hearing:	6 May 2010
Date of last submissions:	10 May 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	142
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Respondent/Cross-Claimant:

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:	**22 FEBRUARY 2011**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS 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.

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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AND:	**HI-TECH TELECOM PTY LTD (ACN 098 008 587)** **Respondent/Cross-Claimant**
JUDGE:	**FOSTER J**
DATE:	**22 FEBRUARY 2011**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1. The applicant, **Uganda Telecom Limited** (**UTL**), seeks to have recognised and to enforce in Australia an award dated 29 April 2009 (**the Award**) made by Mr R Kafuko Ntuyo (**the arbitrator**) who was appointed in early 2009 by the Centre for Arbitration and Dispute Resolution in Kampala, Uganda (**CADER**) to arbitrate certain disputes which had arisen between UTL and the respondent (**Hi-Tech**). The arbitration took place in Uganda and the Award was made in Uganda.
2. In its Application, UTL also claims, in the alternative, common law damages for breach of contract in respect of the underlying contract which was the basis of the relief granted in the Award. If the Court enforces the Award, the common law damages claims will fall away.
3. UTL is a corporation duly incorporated under the laws of the Republic of Uganda. It is based in Kampala, Uganda. UTL owns telecommunications facilities in Uganda and provides telecommunications services there. Hi-Tech is a corporation duly incorporated in Australia. It provides telecommunications services to customers in Australia.
4. On 24 March 2010, pursuant to O 29 r 2(a) of the *Federal Court Rules*, I ordered that the arbitration claims made by UTL in the proceeding be heard separately from and before all other claims made in the proceeding.
5. These Reasons for Judgment determine the arbitration claims.

THE LEGISLATIVE SCHEME

6. Section 8 of the *International Arbitration Act 1974* (Cth) (**the Act**) provides for the recognition and enforcement of foreign awards in Australia. As at the date when the present proceeding was commenced (24 February 2010), that section was 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 had been made in that State or Territory in accordance with the law of that State or Territory.
> (3) Subject to this Part, a foreign award may, with the leave of the Federal Court of Australia, be enforced in the Federal Court of Australia as if the award were a judgment or order of the Federal Court of Australia.
> (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;
> > subsections (1) and (2) do 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.

(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.

7. The *International Arbitration Act Amendment Act 2010* (Act No 97 of 2010) (**the 2010 Act**) effected substantial amendments to the Act.
8. The 2010 Act repealed s 8(3) and replaced it with the following:

> **8 Recognition of foreign awards**
> ...
> (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.

9. The current s 8(3) applies in relation to proceedings to enforce a foreign award brought on or after 7 December 2009, the date when that subsection became operative (see *Part 2—Application* of Schedule 1 to the 2010 Act, Item 29(2)). The amendment to s 8(3) made by the 2010 Act removed the requirement for the leave of the Court to be obtained before a foreign award might be enforced.
10. In addition, the 2010 Act added subsections (3A), (7A), (9), (10) and (11) to s 8 of the Act. Those subsections commenced on 6 July 2010 and apply in relation to proceedings to enforce a foreign award brought on or after 6 July 2010. They do not apply in the present case.
11. A minor amendment was also made to s 8(4) of the Act by the 2010 Act. That amendment is not relevant to the present case.
12. Section 2D, which sets out the objects of the Act, was introduced into the Act by the 2010 Act. That section commenced on 6 July 2010. 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.

13. Sections 39 and 40 were also introduced into the Act by the 2010 Act. They apply in relation to:

(a) the exercise of a power;

(b) the performance of a function;

(c) the interpretation of the Act;

(d) the interpretation of the Model Law; or

(e) the interpretation of an agreement or award

on or after 6 July 2010 (see *Part 2—Application* of Schedule 1 to the 2010 Act, Item 34).

14. The application before me with which this judgment is concerned requires me to perform the functions and do the things contemplated by subpars (c) and (e) of Item 34 and probably also requires me to exercise a power and perform a function under or in relation to the Act or an award and thus engages subpars (a) and (b) of Item 34.
15. Therefore, I must comply with s 39(2) of the Act. Section 39(2) of the Act is in the following terms:

> **39 Matters to which court must have regard**
> ...
> (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.

16. Various terms are defined in s 3(1) 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.
> ***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.

17. *Convention* and *Convention country* are also defined in s 3(1). The Republic of Uganda is a Convention country within the definition of *Convention country* in the Act.
18. Section 3(2) of the Act 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.

19. 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.

20. 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.

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

ISSUES FOR DETERMINATION

22. Hi-Tech did not appear before the arbitrator or participate in any way in the arbitration. It contended before me that it never became aware that the arbitrator was purporting to embark upon an arbitration of the dispute which had arisen between UTL and it. Hi-Tech also contended that that arbitration was never validly constituted. In particular, Hi-Tech put forward the following arguments and contentions by way of defence to UTL's arbitration claims:

(a) The underlying contract between UTL and Hi-Tech which includes the relevant arbitration clause is void for uncertainty. In particular, cl 12 and cl 14 in the Contract are both void for uncertainty. For that reason, the arbitration agreement embodied in cl 14.2 was not valid under the law of Uganda with the consequence that the Award should not be enforced (see s 8(5)(b) of the Act). This point was refined by the time of the trial. By then, Hi-Tech confined its contention based upon uncertainty to cl 14.2 of the Contract.

(b) The composition of the arbitral authority and/or the arbitral procedure was not in accordance with the agreement of the parties with the consequence that the Award should not be enforced (see s 8(5)(e) of the Act).

(c) The dispute purportedly determined by the Award was not within the terms or scope of the relevant arbitration clause (see s 8(5)(d) of the Act). Further, cl 14.2 did not permit UTL to initiate and prosecute the arbitration unilaterally in the absence of specific agreement or acquiescence on the part of Hi-Tech. All that could be done was for UTL to apply to an appropriate Court for an order for specific performance of cl 14.2.

(d) The Award is not *"an arbitral award"* or *"a foreign award"* within the meaning of s 3(1) of the Act and, therefore, is not binding upon Hi-Tech by reason of the operation of s 8(1) of the Act.

(e) Hi-Tech did not receive UTL's letter of demand dated 27 August 2008. Further, Hi-Tech did not receive UTL's Notice for the Appointment of an Arbitrator dated 19 November 2008. Hi-Tech denies that the Notice dated 19 November 2008 was served in accordance with the contractual requirements agreed between the parties for the service of notices and also denies that that Notice and other documents relevant to the arbitration were validly served in accordance with the laws of Uganda. For these reasons, Hi-Tech argues that it was not given proper notice of the arbitration and that therefore the Award should not be enforced (see s 8(5)(c) of the Act).

(f) Hi-Tech was unable to present its case in the arbitration because the Chief Executive Officer and sole director of Hi-Tech (Mr Yahaya) was fearful for his own safety should he travel to Uganda. The Award should therefore not be enforced because Hi-Tech was unable to present its case in the arbitration (see s 8(5)(c) of the Act).

(g) The Award contains errors of law. Initially, two substantial errors were relied upon. First, Hi-Tech submitted that the amount of general damages awarded by the arbitrator was excessive because the arbitrator had awarded nine months of gross income as estimated by the arbitrator without bringing to account the likely costs and expenses that would have been outlaid by UTL in order to earn that income. Second, Hi-Tech argued that the rate of interest awarded by the arbitrator on the amount of special damages assessed by him (viz 24% pa) was excessive. This second ground was abandoned at the trial (Transcript p 70 ll 38–40).

(h) The Court should refuse to enforce the Award since to do so would, in all the circumstances, be contrary to public policy (see s 8(7) of the Act).

23. These defences raise the grounds for refusing to enforce an award provided for in subpars (b) to (e) of subs (5) of s 8 of the Act and the public policy ground provided for in s 8(7)(b) of the Act. Hi-Tech bears the onus of establishing the grounds specified in s 8(5) and s 8(7)(b). In some cases, Hi-Tech also relies upon the leave requirement found in the previous version of s 8 (3) as the basis upon which the Court should refuse to enforce the Award. The proposition advanced by Hi-Tech seemed to be that the requirement for leave gave the Court a broad general discretion to refuse to enforce a foreign award. As the requirement for leave has now been removed from the Act, this point falls away.
24. Hi-Tech also claims that it has an entitlement to damages for conversion of certain equipment owned by it which remains in Uganda. It asserts that UTL has wrongfully seized and converted that equipment to its own use and that the value of that equipment exceeds the amount awarded in the Award. It submits that it is entitled to the benefit of a set-off of greater value than the amount of the Award which must be brought to account against the total amount awarded against it by the arbitrator in the Award. Hi-Tech argues that the Court should not enforce the Award until its offsetting claim has been heard and determined and brought to account as a deduction from the amount awarded in favour of UTL in the Award. This submission relies upon the requirement for leave contained in the earlier version of s 8(3) of the Act and upon s 8 (7). Hi-Tech argues that enforcement of the Award without bringing to account the offsetting claim would be against public policy.

BACKGROUND

25. On 15 November 2007, UTL and Hi-Tech entered into a written agreement, entitled *"Telecommunication Service Contract"* (**the Contract**) for the supply by UTL of telecommunications switching services and facilities to Hi-Tech in order to facilitate the conduct of its international telecommunications traffic to UTL and to other destinations in Uganda.
26. The Contract was signed on behalf of UTL by its Managing Director, Mr Abdulbaset Elazzabi, and its Company Secretary/Legal Counsel, Donald Nyakairu. The signatories on behalf of Hi-Tech were Mr Amadu Yahaya, its Chief Executive Officer, and Mr James Dinh, its Secretary.
27. Articles 4, 5, 12, 14 and 15 of the Contract relevantly provided:

> **ARTICLE 4: OBLIGATIONS OF THE PARTIES**
> **4.1 Hitech agrees to:**
> - Bear the cost of 50% (Fifty Percent) of the cost of internet bandwidth.
> - Send via **UTL** a guaranteed minimum monthly volume of 2,000,000 minutes (send or pay) per month once the link is ready for service and following the Ramp Up Period.
> - HITECH shall upon execution of the contract submit a StandBy and Irrevocable International Letter Of Credit as a Guarantee from an International Bank in the amount of USD 100,000. The bank guarantee shall be according to the terms outlined at schedule. (Annex 4)
> - Reach the targeted ramp up volumes as per Annex 2.
> - Provide to **UTL** the equipment to allow the commencement of the service.
> - Pay all the costs due to the importation and the installation of the equipment.
> - Ensure the training of the staff on the supplied equipment.
> **4.2 UTL agrees to:**
> - assist **HITECH** engineers to install the equipment, [and to provide certain

operational guarantees to Hitech]
...
4.4 The equipment is and shall remain the property of **HITECH** but shall be transferred to **UTL** in case **HITECH** defaults on payment.

ARTICLE 5: BILLING AND PAYMENT
5.1 Billing:
On the 1st day of every month or nearest possible working day to the 1st of the month, **UTL** will generate an invoice based on the traffic generated by **HITECH** and on the current rates applied for the services provided according to the present contract. The said invoice will be established in function of the duration in minute of the routed calls according to the present contract. The invoice will include the traffic by destination, the tariff by destination and the total of the invoice. The calls durations will be captured in seconds. Total monthly durations per destination will be converted into minutes for invoicing purposes.
5.2 Payment
... The total amount due from **HITECH** under the present contract is payable to **UTL** in US$, in available funds, within **fourteen** (14) calendar days after the issuance of **UTL** invoice. In case of non-payment of the invoice by the due date, **UTL** reserves the right to call in the payment guarantee given to **UTL** and to stop service.
5.3 Invoices Adjustments
Requests for billing adjustments must be made within fourteen (14) days of the invoice. Any amount which is determined to be in error will be credited against the next invoice. Such request for adjustment shall not be cause for delay in payment of the **UTL** invoice. If any dispute or claim can't be resolved, then the matter goes to arbitration as per 14.2 below.
ARTICLE 12: NOTICE
12.1 All notices, requests or other communications according to the present contract must be in writing, addressed to the parties as follows:
FOR HITECH:
Physical Address: Suite 24, Level 11, 809 Pacific Highway, Chatswood, Sydney NSW 2067 Australia
Phone: +61 2 8484 8800
Fax: +61 2 8484 8811
E-mail-address: admin@hitech-telecom.com
...
12.2 The notices mailed by registered shall be conclusively deemed to have been received in a conclusive manner by the addressee on the 5 business day following the mailing of sending thereof. Those sent by fax or telex shall be conclusively deemed to have been received when the delivery confirmation is received by first class stamped mail. The party who wishes to modify the address to which their correspondence is sent may do so by providing the new address in writing to the other party.
ARTICLE 14: GOVERNING LAW ARBITRATION
14.1 The present contract is governed, interpreted and applied in accordance

> to the laws of the Republic of Uganda including all concerns of construction, validity and performance. In the case where an action or procedure occurs affecting the present contract, the party to take advantage of such an action agrees to cover the costs, legal or other.
> **14.2** Any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to a compulsory arbitration.
> **ARTICLE 15: ENTIRE AGREEMENT**
> **15.1** The present contract, as well as annex, destinations and tariffs, represent the entire agreement between the parties related to the business indicated in the present contract an [sic] replacing all the earlier concluded verbal and written agreements by both parties. The present contract can only be modified in writing by both parties.
> **15.2** The present contract may be signed in multiple copies, and each will be reputed to be an original.

28. The term of the Contract was one year from 15 November 2007. The Contract was renewable for a further year by agreement of the parties. The Contract could be terminated without cause upon the giving of three months' notice in writing.
29. In cl 12, one of three named employees of Hi-Tech was nominated as the person to whom particular types of enquiries should be directed. For example, billing enquiries and enquiries about invoices addressed to Hi-Tech were to be directed to Cindy Liang and billing disputes were to be directed to Cengiz Mehmedali.
30. Annexure 5 to the Contract contained a list of what is there described as *"Contact points and Escalation list"*. The list comprises the names and contact details for various employees of UTL and Hi-Tech under particular headings dealing with particular subject matters. Annexure 5 was not referred to in the body of the Contract. Hi-Tech did not attribute any significance to Annexure 5 insofar as UTL's arbitration claims are concerned.
31. Following the execution of the Contract, UTL provided telecommunications switching services to Hi-Tech for the months of December 2007, January 2008 and February 2008.
32. Hi-Tech failed to provide the irrevocable bank guarantee required under Clause 4.1 of the Contract. Although it asserts that it sent a guarantee to UTL, it concedes that UTL never received it. It now admits that it never provided that guarantee.
33. On 3 January 2008, UTL sent an invoice for the month of December 2007 in the amount of USD3,621.29. On 1 February 2008, UTL sent an invoice for the month of January 2008 in the amount of USD30,803.15. Another invoice in the amount of USD110,141.50 was sent on 3 March 2008.
34. The only payment which Hi-Tech made against these invoices was USD3,621.29 in respect of the December 2007 invoice.
35. On 20 February 2008, Mr Rubona, UTL's Manager of International Business, informed Hi-Tech's CEO, Mr Yahaya, that UTL would suspend the provision of its services to Hi-Tech until Hi-Tech met its contractual obligations under the Contract. The alleged breaches at that point in time were the failure to provide the bank guarantee and the non-payment of the 1 February 2008 invoice.
36. On 27 March 2008, Mr Yahaya sent an email to Mr Rubona with a copy to other members of UTL's staff—namely, Mr Donald Nyakairu, Mr Hans Paulsen and Mr James Wanjogu—seeking to arrange a meeting for the purpose of discussing UTL's suspension of its services to Hi-Tech. No such meeting ever took place.

37. On 27 August 2008, UTL's legal representatives, Barugahare & Co Advocates, sent a letter dated that day to Mr Yahaya. That letter was sent by registered mail to Hi-Tech at Suite 24, Level 11, 809–811 Pacific Highway, Chatswood, Sydney, NSW 2067, Australia (**the Chatswood address**). It was also emailed to Mr Yahaya, to Charles Osei, an employee of Hi-Tech and to Jocelyn Sinha, an employee of Hi-Tech. No "failure to deliver" notification was received by Barugahare & Co in respect of those emails. The letter was headed *"Notice of Intention to Sue—Uganda Telecom Debt of US$140,944.45"*. In that letter, Barugahare & Co demanded the immediate payment of USD140,944.45 as well as USD14,094 in debt recovery fees and stated UTL's intention to sue in the High Court of Uganda and/or in the Supreme Court of New South Wales if full payment of the above two sums (totalling USD155,038) was not effected within seven days of the date of receipt of the letter. The amount claimed was the total of the amounts claimed in the February 2008 and March 2008 invoices.
38. Hi-Tech never responded to the letter of 27 August 2008 nor was the letter returned to Barugahare & Co undelivered. Barugahare& Co never received any indication from the postal service in Uganda or from Australia Post that the letter had not been delivered.
39. On 19 November 2008, Barugahare & Co Advocates sent a further letter to Hi-Tech. That letter was delivered to the Chatswood address on 25 November 2008 by DHL International Pty Ltd (**DHL**), a courier company. That letter was in the following terms:

> 19th November 2008
> BCAC/UTL/147/08
> The Chief Executive Officer
> Hitech Telecom Pty Ltd
> Suite 24, Level 11
> 809-811 Pacific Highway
> Chatswood
> Sydney
> New South Wales 2067
> AUSTRALIA
> **Attention: Amadu Yahaya,**
> Dear Sir,
> **Appointment of an Arbitrator – Uganda Telecom Ltd Debt of US$ 140,944.45**
> Reference is made to our letter dated 27th August 2008 regarding the above matter.
> We continue to act for and on behalf of Uganda Telecom Ltd and we note that no response has been received by us in respect of our letter.
> In accordance with Article 14 of the agreement between Uganda Telecom Ltd and Hitech Telecom Pty Ltd dated 15th November 2007, we hereby propose that a sole arbitrator be appointed to adjudicate in the dispute.
> We propose the appointment of Hon Justice Alfred Karokora as the sole arbitrator. Hon Justice Alfred Karokora is a retired Judge of the Supreme Court of Uganda, with many years of experience in Uganda's Judiciary and is highly regarded.
> Please note that given that Article 14 of the Agreement stipulates that the governing law is the law of Uganda, the arbitrator must be conversant with the laws of Uganda.
> If you do not respond within seven (7) days from the date of this letter, we shall proceed to apply to the Centre for Arbitration and Dispute Resolution

for the appointment of an arbitrator pursuant to **Section 11** of the **Arbitration and Conciliation Act (Cap 4-Laws of Uganda).**

40. Hi-Tech did not respond to the letter of 19 November 2008.
41. On 19 December 2008, UTL lodged with CADER an application for the appointment of an arbitrator in relation to its dispute with Hi-Tech. That application was made in accordance with the relevant Ugandan statutory provisions (the *Arbitration and Conciliation Act Cap 4 Laws of Uganda, 2000 Revised Edition*) (**the UAA**). Under the UAA, if the parties have an arbitration agreement, then the agreed arbitration may be conducted by CADER. CADER is established under Pt VI, s 67 of the UAA.
42. On 23 December 2008, Barugahare & Co received a Chamber Summons issued by CADER for service upon Hi-Tech. After consulting a company search extract obtained from the Australian Securities and Investments Commission (**ASIC**) to determine the appropriate mailing address, Barugahare & Co served Application CAD/ARB/No 23 of 2008 on Hi-Tech's registered address (as recorded in the ASIC company extract) by registered post on the same day (23 December 2008). The registered address of Hi-Tech to which the Chamber Summons was sent was the Chatswood address. An affidavit of service was sworn by Mr Namanya of Barugahare& Co on 9 January 2009 proving service of Application No 23 of 2008 for the purposes of CADER's consideration of the Chamber Summons.
43. The application for appointment of an arbitrator was heard by the Executive Director of CADER, Mr Jimmy Muyanja, on 12 January 2009. There was no appearance either by or on behalf of Hi-Tech at that hearing. UTL was represented at that hearing. Mr Muyanja delivered a Ruling on that application on 16 January 2009 in which he found that:

(i) He was satisfied with the affidavit of service sworn by Mr Namanya of Barugahare& Co evidencing service of the Chamber Summons on Hi-Tech;

(ii) Hi-Tech's inaction reflected a refusal on its part to participate in the formation of the arbitral tribunal; and

(iii) UTL's application for the appointment of an arbitrator should be granted and Mr Robert Kafuko Ntuyo should be appointed as sole arbitrator.

44. On 20 January 2009, Barugahare & Co notified Mr Ntuyo of his appointment as the sole arbitrator of the dispute between UTL and Hi-Tech and enclosed a copy of CADER's Ruling dated 16 January 2009. A copy of that material was also sent to Hi-Tech by registered mail to the Chatswood address.
45. On 3 February 2009, a Summons was issued by Mr Ntuyo, requiring the parties to appear before him as arbitrator on 18 February 2009 at the Commercial Court premises in Kampala. On 4 February 2009, service of the Summons, Parties' Undertaking and Arbitrator's Declaration of Acceptance and Statement of Impartiality was effected on the legal representatives of UTL. Service was effected on Hi-Tech on 5 February 2009 by sending those documents by registered post to Hi-Tech at the Chatswood address. Service in this manner was subsequently proven before the arbitrator by an affidavit sworn by his legal assistant, Kateregga Ronald.
46. On 18 February 2009, a preliminary meeting in the arbitration was held before the arbitrator at the offices of CADER in Kampala. Hi-Tech did not appear at this meeting. For this reason, the arbitrator ordered that the hearing commence and be conducted on an *ex parte* basis. A program

for the arbitration was discussed and agreed at this time. The arbitrator did not embark upon the substantive hearing on that day.

47. On 20 February 2009, a Party Undertaking incorporating procedural directions for the conduct of the arbitration and an arbitration timetable was signed by the arbitrator and the legal representatives of UTL. This document formalised the arrangements which had been agreed at the preliminary meeting held on 18 February 2009. It was not sent to Hi-Tech nor was it signed either by or on behalf of Hi-Tech.
48. On 20 February 2009, Barugahare & Co, acting as UTL's legal representative in the arbitration, filed UTL's Statement of Claim and Witness Statements in the arbitration with CADER in accordance with the timetable contained in the Undertaking. The Statement of Claim and Witness Statements filed by UTL in the arbitration were sent by registered post to Hi-Tech at the Chatswood address at 11.22 am on 26 February 2009.
49. Hi-Tech did not file any Defence in the arbitration nor did it file any evidence. Hi-Tech took no part in the arbitration.
50. On 13 March 2009, the arbitrator ordered that the arbitration proceed under s 25(b) and s 25(c) of the UAA. He fixed 18 March 2009 for the hearing. Section 25(b) and s 25(c) permit an arbitrator in Uganda to continue with an arbitration and to make an award on the evidence before him if any party fails to appear at the hearing or fails to produce documentary evidence before him. In that event, the arbitrator must still be satisfied that he should make an award and of the basis for it. The failure of a party to appear at the hearing is not, of itself, to be treated as an admission of the claimant's allegations.
51. On 29 April 2009, the arbitrator delivered the Award. It was in favour of UTL. He awarded UTL USD433,695 for general damages reflecting nine unbilled months under the Contract, USD140,944.65 in special damages (being the unpaid charges due under the Contract for January and February 2008), interest at the rate of 8% on the amount of the general damages (ie 8% on USD433,695) and interest at the rate of 24% on the amount of the special damages (ie 24% on USD144,944.65) and costs.
52. On 11 May 2009, Mr Ntuyo issued a taxation certificate certifying that UTL's bill of costs had been taxed and allowed at UGX48,709,922.
53. By letter dated 17 June 2009, Barugahare & Co wrote to Mr Yahaya to inform him that the arbitration had been conducted and concluded *ex parte* and that an award had been delivered on 29 April 2009 in favour of UTL. The letter, which was sent by registered post and also by DHL courier to Hi-Tech at the Chatswood address, enclosed copies of the Award and the taxation certificate dated 11 May 2009. In that letter, Barugahare & Co demanded payment of the sums due to UTL pursuant to the Award. The total amount claimed was USD597,138.45 plus interest.
54. In the letter dated 17 June 2009, Barugahare & Co said:

> We note that you were served with the relevant pleadings but chose not to participate in the arbitration proceedings.

55. On 28 July 2009, the Award was registered at the Commercial Division of the High Court of Uganda, in accordance with the UAA and a decree was taken out for the purposes of execution. That decree is in the following terms:

> **THE REPUBLIC OF UGANDA**
> **IN THE HIGH COURT OF UGANDA AT KAMPALA**
> **COMMERCIAL DIVISION**
> **ARBITRATION CAUSE NO. 3 OF 2009**

UGANDA TELECOM LTD CLAIMANT
VERSUSHITECH TELECOM PTY LTD RESPONDENTDECREE
Upon perusing the Arbitral Award delivered on the 29th April 2009 by **Mr. Kafuko- Ntuyo Robert**, Arbitrator and delivered in the presence of **Mr. Alunga Patrick** counsel for the Claimant and the Taxation Certificate in the matter dated 11th May 2009;
It is hereby Ordered and Decreed that:
(a) The Claimant is awarded the sum of USD 140,944.65 (United States Dollars One Hundred and Forty Thousand Nine Hundred Forty Four and Sixty Five Cents) as Special Damages;
(b) The Claimant is awarded the sum of USD 433,695 (United States Dollars Four Hundred Thirty Three Thousand Six Hundred Ninety Five) as General Damages;
(c) The Claimant is awarded Interest on Special Damages at the rate of 24% p.a from the date of each respective unpaid invoice raised till payment in full;
(d) The Claimant is awarded Interest on General Damages at the rate of 8% p.a from the date of delivery of the award till payment in full; and
(e) The Claimant is awarded Costs of the Award taxed and allowed at Ushs. 48,709,922 (Uganda Shillings Forty Eight Million Seven Hundred and Nine Thousand Nine Hundred and Twenty Two).

56. The Award satisfies the definition of *arbitral award* in s 2(1)(d) of the UAA. Under that Act, such an award shall be recognised in Uganda as binding and, upon application in writing to the High Court in Uganda, shall be enforced (s 35(1)). Where the time for setting aside an arbitral award has expired and no application to set aside that award has been made, the award shall be enforced in the same manner as if it were a decree of the Court.
57. The Award has been recognised by the High Court of Uganda and may be enforced as such.
58. In the present case, UTL invokes the Act and seeks to enforce the Award as a foreign award under the Act. It does not seek to enforce in this Court the decree made by the High Court of Uganda.
59. On 25 September 2009, Curwoods Lawyers, on the instructions of Barugahare& Co, sent a letter of demand to Hi-Tech at the Chatswood address requiring payment of the sum of USD793,715.84 in accordance with the amounts awarded by the arbitrator on 29 April 2009.
60. Hi-Tech has not paid the amounts owed by it under the Award. It now admits this. Until it filed its Cross-Claim in this proceeding, it had not sought to offset any debt or claim against the amounts awarded against it in the Award.
61. On 24 February 2010, Curwoods Lawyers filed an Application in this Court on behalf of UTL. In that Application, UTL claimed an order granting leave to UTL to register the Award as a final judgment of the Commonwealth of Australia pursuant to s 8 of the Act, a declaration that Hi-Tech comply with the Award and a declaration that the Award is enforceable. In the alternative, it claimed equitable or common law compensation as well as interest and costs.

CONSIDERATION

Issues (a), (b) and (c)—The Issues Concerning the Scope and Effect of Cl 14.2

62. Under this heading, I shall deal with issues (a), (b) and (c) described at [22] above.

63. The Contract is governed by the laws of Uganda (cl 14.1). Clause 14.2 is infelicitously expressed. However, in my view, the meaning of the clause is clear: All disputes under or in relation to the Contract must be referred to arbitration.
64. Hi-Tech submitted that cl 14.2 was uncertain and thus void because the clause did not address the following matters:

(a) The seat of the arbitration;

(b) The identity of the arbitrator(s);

(c) The number of arbitrators;

(d) The service of documents by which the arbitration was initiated;

(e) The manner in which any dispute concerning the appointment of the arbitrator(s) was to be resolved; and

(f) The rules that were to apply to the arbitration.

65. Hi-Tech also submitted that cl 14.2 was uncertain because it did not specify the law which was to govern the arbitration.
66. It was also submitted that the Court could not fill these alleged gaps by resort to the law governing the implication of contractual terms.
67. In the event that cl 14.2 is held to be void, UTL's claims to enforce the Award must fail.
68. The Contract was made in Uganda. It is governed by the laws of Uganda. It concerns the provision of services in Uganda. One of the parties to the Contract (UTL) is incorporated in Uganda. Payments under the Contract were required to be made to UTL in Uganda.
69. Hi-Tech's submissions focussed on alleged omissions from cl 14.2 rather than on ambiguities or uncertainty in the language of cl 14.2. Hi-Tech's case was that the parties had simply failed to reach agreement on a raft of important matters.
70. As already mentioned at [63] above, I think that the meaning of the clause is clear. The questions for present purposes are: Are at least some of the matters listed at [64] above not covered by cl 14.2 and the laws of Uganda? If so, are the omissions so serious as to render the clause void for uncertainty?
71. The UAA applies to both domestic arbitrations and international arbitrations which take place in Uganda (s 1). The arbitration in the present case was a domestic arbitration in Uganda.
72. Clause 14.2 is an *arbitration agreement* within the meaning of the UAA. Section 2(1)(c) defines *arbitration agreement* as follows:

> "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;

73. Section 3 of the UAA provides:

> **3. Form of arbitration agreement**
> (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

> (2) An arbitration agreement shall be in writing.
> (3) An arbitration agreement is in writing if it is contained in—
>
> > (a) a document signed by the parties; or
> > (b) an exchange of letters, a telex, a telegram or other means of telecommunication which provides a record of the agreement.
>
> (4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

74. *Appointing authority* and *arbitration* are also defined in s 2. Those definitions are:

> (a) "appointing authority" means an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators;
> (b) "arbitration" means any arbitration whether or not administered by a domestic or international institution where there is an arbitration agreement;

75. Subject to resolving the questions raised by Hi-Tech concerning the alleged omissions from cl 14.2, I think that cl 14.2 is an *arbitration agreement* within the meaning of that expression in s 2(1)(c) of the UAA.
76. CADER was established by the UAA (s 67). It is authorised by the UAA to perform the functions listed in s 68. Those functions include the appointment of arbitrators for the purposes of the UAA.
77. In the absence of further agreement, the seat of the arbitration is to be determined by the arbitrator (s 20(2)). In the present case the arbitrator determined that the arbitration should take place at the premises of the Commercial Court in Kampala, Uganda.
78. Sections 10–15 of the UAA lay down a comprehensive regime for the appointment of one or more arbitrators in circumstances where the parties' agreement does not address or does not adequately address the appointment of the arbitrator or where the agreed process fails. That regime was meticulously followed in the present case. Under ss 11(2)(b), 11(3)(b), 11(4)(a), 11 (5), 11(6), 67 and 68, CADER may appoint an appropriately qualified arbitrator if the parties to an arbitration agreement fail to agree on the arbitrator. Such an appointment shall be final and not be subject to appeal.
79. Subject to the UAA, the parties are free to agree on the procedure to be followed in the conduct of the arbitration (s 19(1)). If there is no agreement, the arbitral tribunal may, subject to that Act, conduct the arbitration in such manner as it thinks appropriate (s 19(2)).
80. Section 19(3) provides:

> The power of the arbitral tribunal under subsection (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

81. The arbitration commences on the date on which a request for the dispute to be referred to arbitration is received by the respondent (s 21). It shall be terminated by the making of a final award (s 32(1)).
82. Matters such as service of documents are within the discretion of the arbitrator (s 19(1) and s 19 (2)), although, in the absence of some other agreement between the parties, s 8 of the UAA deems certain written communications to have been received on the day of delivery at one of the addresses specified in that section.
83. It follows from the above analysis that the matters which Hi-Tech contended were omitted from cl 14.2 were all covered in detail and adequately by the UAA. The UAA provided the machinery to facilitate arbitration once the arbitration clause was engaged.
84. Clause 14.2 is not void for uncertainty.
85. For the same reasons, I reject Hi-Tech's submission that the composition of the arbitral authority and the arbitral procedure followed in the present case were not in accordance with the agreement of the parties. The UAA governed these matters in the circumstances of the present case.
86. Contrary to Hi-Tech's submissions, the arbitrator was validly appointed pursuant to the UAA and the procedure which he followed conformed to the overriding requirements of the UAA.
87. I also find that the dispute which was referred to arbitration was within the scope of cl 14.2. It involved the non-payment by Hi-Tech of sums claimed by UTL under the Contract; the question of whether the Contract had been validly terminated; and the entitlement of UTL to damages for its lost bargain. All of these matters are matters which constitute alleged breaches of the Contract and, in one case, the alleged repudiation of the Contract. They are all within the scope of cl 14.2 and are thus caught by that clause.
88. Section 11 of the UAA governs the appointment of the arbitrator in the event that disputes covered by the relevant arbitration clause are to be referred to arbitration. The parties are free to agree on the arbitrator. However, if they do not agree, s 11 provides a mechanism for the appointment of the arbitrator. It clearly contemplates a state of affairs in which one party wishes to engage the arbitration agreement and to refer disputes to arbitration but the other party refuses to cooperate. In this sense, the unilateral invocation of arbitration is permissible.
89. For these reasons, I reject Hi-Tech's contention that the arbitration in the present case was not validly commenced because it was initiated unilaterally by UTL (Issue (c)).

Issue (d)—Was the Award "an arbitral award" and a "foreign award" within s 3(1) of the Act?

90. *Arbitral award* is defined in s 3(1) of the Act. That definition picks up the definition of that expression contained in the Convention. In the Convention, an arbitral award is an award made by an arbitrator which determines differences and disputes between persons (including corporations) which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement or resolution by arbitration (see Arts I(1), II(1) and II(2)).
91. The Award is an arbitral award within the meaning of s 3(1). It also satisfies the definition of *arbitral award* in s 31 of the UAA. It is also a *foreign award* within the definition of that term in s 3(1) of the Act. It was made pursuant to an arbitration agreement (cl 14.2) in a country other than Australia (viz in Uganda). As already mentioned at [17] above, Uganda is a Convention country for the purposes of the Act. The Award is an arbitral award to which the Convention applies. It meets the definition of *arbitral award* for the purposes of the Convention. I reject Hi-Tech's contentions that the Award was neither an *arbitral award* nor a *foreign award* within the meaning of those terms in the Act.

Issue (e)—Notice

92. This issue involves two broad contentions by Hi-Tech. First, Hi-Tech submitted that it never became aware of the commencement of the arbitration or of the procedural requirements laid down by the arbitrator. This is a question of fact. Second, Hi-Tech submitted that, even if the Court should hold that it was aware of the commencement of the arbitration, the initiating letter dated 19 November 2008 and formal documents subsequently created for the purposes of the arbitration were not served upon it as required by the Contract and the UAA. Hi-Tech submitted that, if these formalities were not complied with, the Award should not be enforced. These submissions rely upon s 8(5)(c) of the Act.

Notice in Fact

93. Mr Yahaya stated in an affidavit sworn by him which was read at the hearing that he was not aware that the arbitration had taken place in Uganda. He also said that he had not received notice of it. He said that he did not receive the letter dated 19 November 2008 from Barugahare & Co to him nor did he receive a copy of the letter dated 20 January 2009 addressed to the arbitrator. He also denied receiving the Statement of Claim and Witness Statements filed by UTL.
94. Mr Yahaya gave oral evidence at the hearing. He was cross-examined.
95. The unchallenged evidence led by UTL was that the letter dated 27 August 2008 was sent by registered mail to the Chatswood address and also by email to Mr Yahaya, Mr Osei and Ms Sinha.
96. Barugahare& Co did not receive any return communication which suggested that the letter had not actually been received by Hi-Tech or that the emails had not reached the intended addressees.
97. The letter dated 27 August 2008 did not initiate the arbitration.
98. The critical letter in this regard was the letter dated 19 November 2008. In that letter, Barugahare & Co proposed that a sole arbitrator be appointed to adjudicate the dispute and suggested a retired Ugandan judge. In that letter, Barugahare & Co also stated that, should Hi-Tech not respond within seven days of the date of the letter, they would apply to CADER for the appointment of an arbitrator pursuant to s 11 of the UAA. That letter was delivered by DHL to the Chatswood address.
99. Section 21 of the UAA provides that, unless the parties otherwise agree, the arbitral proceedings shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.
100. The letter dated 19 November 2008 was delivered by DHL to the Chatswood address on 25 November 2008. On 25 November 2008, the Chatswood address was the registered office of Hi-Tech and one of two addresses shown in the records of ASIC as its principal place of business. The evidence before me also established that the records of ASIC continued to show the Chatswood address as the registered office of Hi-Tech and as one of two addresses said to be its principal place of business at all material times right up to the date of the hearing.
101. Mr Yahaya testified that, in approximately October 2008, Hi-Tech moved its business from the Chatswood address to an address in North Ryde (**the North Ryde address**). He said that, from that time, all mail which ordinarily came via Australia Post was redirected to the North Ryde address.
102. UTL tendered evidence at the hearing which established that, as at 24 February 2010:

(a) On the tenant directory board located at ground floor level outside the front door of the building constructed at 809–811 Pacific Highway, Chatswood, on the tenant directory board inside the main

lobby on the ground floor of that building and on a similar board located on Level 11 in that building (where Suite 24 is to be found), Hi-Tech was shown as a tenant of Suite 24 on Level 11;

(b) On the reception desk inside Suite 24 on Level 11 there was a sign which said that Hi-Tech had moved to the North Ryde address;

(c) Suite 24 was occupied but locked. At least one person was in occupation of the suite; and

(d) Hi-Tech's website showed its Head Office as the Chatswood address.

103. Notwithstanding his denials (which I find unconvincing), I find that Mr Yahaya did receive the letter dated 27 August 2008 from Barugahare & Co to Hi-Tech. It was sent both by email and by registered post. It was not returned and there was no "non-delivered" tag sent to Barugahare & Co in respect of the emails under cover of which the letter was sent to three employees of Hi-Tech. Someone on behalf of Hi-Tech must have signed for the original letter which was sent by registered post. I find that whoever signed for the original letter then brought it to the attention of Mr Yahaya. Mr Yahaya accepted that Hi-Tech's business was still located at the Chatswood address as at 27 August 2008. Hi-Tech was, therefore, aware from about the end of August 2008 that UTL was threatening to sue.
104. In his oral evidence, Mr Yahaya said that no-one from Hi-Tech was in occupation of the Chatswood office after Hi-Tech moved its business to the North Ryde address in October 2008. But the office was plainly occupied in February 2010 by someone. All of the objective indications were that the occupant at that time was Hi-Tech and its associate, Pennytel. The Chatswood address was still shown in the records of ASIC as the registered office of Hi-Tech and a principal place of business of Hi-Tech. It was also shown as the Head Office of Hi-Tech on Hi-Tech's website. No steps were taken at any time between October 2008 and the date of the hearing in 2010 to alter the address of Hi-Tech's registered office in ASIC's records or to delete the Chatswood address from those records and from Hi-Tech's website as one of two principal business addresses for Hi-Tech.
105. I find that the February 2010 state of affairs was also the state of affairs that obtained in late November 2008 and at all relevant times thereafter. Whether or not Hi-Tech moved its business or some of its business to the North Ryde address in October 2008, I find that it continued to occupy the Chatswood address either alone or jointly with Pennytel. The Chatswood address remained the address of the registered office of Hi-Tech for the purposes of the *Corporations Act 2001* (Cth) and one of its principal places of business for the purposes of that Act and generally.
106. For these reasons, I find that the letter from Barugahare & Co to Hi-Tech dated 19 November 2008 was delivered to premises which were then still occupied by Hi-Tech and was, therefore, brought to the attention of Mr Yahaya. I do not accept Mr Yahaya's denials to the effect that he never saw the 19 November 2008 letter until much later.
107. I also find that the copy letter dated 20 January 2009 and Statement of Claim and Witness Statements were also actually received by Hi-Tech at the Chatswood address and brought to the attention of Mr Yahaya.
108. These findings necessarily involve my rejecting Mr Yahaya's evidence to the effect that he did not see these documents until 2010 and did not know about the arbitration until September or October 2009.
109. I find, therefore, that, from late November 2008, Hi-Tech was aware that HTL intended to refer the disputes which had arisen between UTL and Hi-Tech to arbitration in Uganda and deliberately chose not to participate in the arbitration. In addition, I find that the arbitration

commenced on 25 November 2008, the date when the letter dated 19 November 2008 was received by Hi-Tech (see s 21 of the UAA).

Deemed Notice

110. In any event, the letter dated 19 November 2008, the copy letter dated 20 January 2009 and the Statement of Claim and Witness Statements were all sent to the address specified in the Contract as the address to which notices under the Contract should be sent. It was also a principal place of business and the registered office of Hi-Tech in November 2008 according to the records of ASIC.
111. The letter dated 19 November 2008 was a notice issued under the Contract and under the UAA (s 21). It was the communication by which UTL requested and notified Hi-Tech that the disputes which had by then arisen between them be referred to arbitration.
112. Hi-Tech submitted that the subsequent letters and documents sent by Barugahare & Co to Hi-Tech were not written communications under the Contract and thus not covered by cl 12. In the alternative, Hi-Tech submitted that, if those communications were covered by cl 12, UTL had not complied with cl 12 because the letters and documents had not been sent to the correct employee as specified in cl 12.
113. The letter dated 19 November 2008 was delivered to the Chatswood address which was the address specified for Hi-Tech in cl 12.1 of the Contract. It was not sent by registered mail. UTL cannot, therefore, rely upon cl 12.2 in respect of the letter dated 19 November 2008. But this does not matter. Clause 12 does not require that service be effected by registered mail and only by that means. Service may be effected under cl 12.1 by sending the communication by ordinary post to the Chatswood address or by delivering the communication to that address. Clause 12.2 facilitates proof of service in the event that the communication is sent by registered mail.
114. The subsequent communications were all formal communications concerning the arbitration and were not communications under (or *"according to"*) the Contract. They were not, therefore, the kind of communication covered by cl 12.1 of the Contract.
115. Section 8(1) of the UAA provides that any written communication for the purposes of the UAA is deemed to have been received if it is delivered to the addressee's place of business or mailing address. If delivered at one or other of those addresses, it is deemed to have been received on the day it is so delivered.
116. The written communications referred to at [42], [44], [45], [48] and [53] above were all sent by registered post to the Chatswood address. They were sent in the period from late December 2008 to mid-June 2009. At all times in that period, the Chatswood address was a place of business of Hi-Tech and, being its registered office, was its mailing address. None of these communications was returned to Barugahare & Co and neither that firm nor UTL was ever told anything by the postal service in Uganda or by Australia Post that suggested that any of these communications had not been delivered to the Chatswood address. Someone associated with Hi-Tech must have signed for and received each and every one of them.
117. I find that all of these communications were delivered to the Chatswood address and are thus deemed to have been received by Hi-Tech by reason of the operation of s 8(1) of the UAA. In each case, the communication is deemed to have been received on the day it was delivered (s 8 (2)).
118. Hi-Tech was given proper notice of the arbitration. It has failed to satisfy me that it was not and thus has failed in its defence based upon s 8(5)(c) of the Act insofar as it is based upon lack of notice.

Issue (f)—The Fear Factor

119. Counsel for Hi-Tech submitted that Hi-Tech was unable to present its case in the arbitration proceedings for the reason that Mr Yahaya was not prepared to travel to Uganda because he was fearful for his own personal safety and would not have received a fair hearing there.
120. The difficulty with this submission is that there was no evidence before me to support it. Mr Yahaya said that he never knew about the arbitration until September 2009 or October 2009. He also said that he did not receive the letter of 19 November 2008 from Barugahare& Co or any of the arbitration documents sent to Hi-Tech subsequently. In those circumstances, it was not open to Mr Yahaya to give evidence of his actual state of mind. He could not tell me how he actually felt because he denied ever knowing about the arbitration. In any event, he did not give any evidence of that character.
121. Mr Yahaya gave evidence (over objection) by which he sought to establish that, by early 2009, he was generally afraid to travel to Uganda because of other entirely unrelated dealings with the Ugandan Minister of State who had responsibility for the procurement of computer equipment for the government of Uganda.
122. This evidence established that Hi-Tech was in dispute with the Minister in early 2008 concerning this unrelated transaction but the evidence fell well short of establishing that, for that reason, Mr Yahaya had a reasonable basis for fearing for his personal safety should he travel to Uganda in early 2009 in order to represent Hi-Tech at the arbitration hearing in relation to UTL's claims against it for breach of the Contract. Indeed, in early 2008, Hi-Tech threatened to sue the Minister. It maintained that threat throughout 2008 and in the early part of 2009. It had no difficulty in threatening to bring proceedings in Uganda in respect of this other transaction. Mr Yahaya's assertions that he was afraid to travel to Uganda are convenient but unsubstantiated.
123. I reject Hi-Tech's defence based upon the proposition that it was unable to present its case because Mr Yahaya feared for his personal safety in Uganda.
124. I also reject the suggestion made by him that Hi-Tech and he could not get a fair hearing in Uganda. There was no evidence to support this assertion either.

Issue (g)—Errors of Law

125. This contention has now been confined to the proposition that the amount of general damages awarded by the arbitrator in the Award was arrived at by an erroneous reasoning process involving mistakes of fact and law.
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* [1974] USCA2 836; 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 (eg *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2004] USCA5 66; 364 F 3d 274 at 306 (2004).
130. A more conservative approach has sometimes been taken in Australia (see eg *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428–432).
131. In *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; (2004) 183 FLR 317 at [6]–[14] and at [18] (pp 319–322), McDougall J said:

    6. An amended defence was filed on 14 July 2004, and a reply thereto was filed on 21 July 2004. The essential argument which is thrown up is whether it is open to the defendant, in the hearing of a claim for enforcement of an international arbitration award, to raise the defence of illegality (said to enliven the discretion set out in s 8(7)(b) of the *International Arbitration Act 1974* (Cth)) in circumstances where, it is said, the relevant facts were argued before and were the subject of the decision of, the arbitrator.
    7. The parties have suggested that this is a question of substantial practical importance. I am not sure that this is so.
    8. The plaintiff founds its claim upon some remarks in *Soleimany v Soleimany* [1998] CLC 779. The court said:

> It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he

> should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality.

9. It is important to note that, before the court said what I have set out, it said on the same page "[w]e do not propound a definitive solution to this problem": a remark that I understand to indicate that the passage that I have set out was not intended to be definitive.
10. It is clear that, upon an application for an enforcement of an international arbitral award, the discretion that is conferred (in Australia) by s 8(7)(b) of the Act is wide. It may also be, although I express no concluded view, that there is, in addition, a general discretion: see *Resort Condominiums International v Bolwell* [1995] 1 Qd R 406.
11. The plaintiff relies upon the remarks in *Soleimany*, to which I have referred, and upon the dissenting judgment of Waller LJ in *Westacre Investments Inc v Jugoimport SPDR Holding Co* [2000] QB 288. Although his Lordship was part of the court that decided *Soleimany*, his views did not find favour with Mantell LJ and Sir David Hirst. Indeed, of the passage in *Soleimany* that I have referred to and that Waller LJ relied upon, Mantell LJ said at 316-317:

> For my part I have some difficulty with the concept and even greater concerns about its application in practice, but, for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that the attempt to re-open the facts should be rebuffed.

12. In *Westacre*, the court, by majority, dismissed an appeal from Colman J. His Lordship's judgment is reported at *Westacre Investments Inc v Jugoimport - SPDR Holding Co Ltd* [1999] QB 740. At pages 767-768 of the report, his Lordship summarised what he said was the effect of the authorities. He said:

> The effect of the authorities is in my judgment as follows.
> (i) Where it is alleged that an underlying contract is illegal and void and that an arbitration award in respect of it is thereby unenforceable the primary question is whether the determination of the particular illegality alleged fell within the jurisdiction of the arbitrators. (ii) There is no general rule that, where an underlying contract is illegal at common law or by reason of an English statute, an arbitration agreement, which is ancillary to that contract is incapable of conferring jurisdiction on arbitrators to determine disputes arising within the scope of the agreement including disputes as to whether illegality renders the contract unenforceable. (iii) Whether such an agreement to arbitrate is capable of conferring such jurisdiction depends upon whether the nature of the illegality is such that, in the case of statutory illegality the

> statute has the effect of impeaching that agreement as well as the underlying contract and, in the case of illegality at common law, public policy requires that disputes about the underlying contract should not be referred to arbitration. (iv) When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at common law, an award in favour of the claimant would not be enforced for it would be contrary to public policy that the arbitrator should be entitled to ignore palpable and indisputable illegality. If, however, there was an issue before the arbitrator whether the underlying contract was illegal and void, the court would first have to consider whether, having regard to the nature of the illegality alleged, it was consistent with the public policy which would, if illegality were established, impeach the validity of the underlying contract, that the determination of the issue of illegality should be left to arbitration. If it was not consistent, the arbitrators would be held to have no jurisdiction to determine that issue. (v) If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award. (vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular.

13. His Lordship's judgment was considered by the Court of Appeal in *Soleimany*. Their Lordships, in *Soleimany*, said, of what Colman J had said:

> But, in an appropriate case it [the court] may inquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J., who limited his sixth proposition to cases where

> there were relevant facts not put before the arbitrator.

14. It seems to be clear, from what the Court of Appeal said in *Soleimany* as to the sixth proposition of Colman J in *Westacre* at first instance, that it is open in principle to a defendant, in the position of the present defendant, to seek to rely on illegality, pursuant to s 8(7)(b), or its equivalent, even if the illegality was raised before and decided by the arbitrator. I do not see anything in the decision of Mantell LJ in *Westacre* to the contrary. Indeed, I read what Mantell LJ said in *Westacre* as expressing, at the very least, a slight scepticism as to the passage in *Soleimany* upon which the plaintiff relies.

...

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 is 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.

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. Whilst 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.

134. I reject this challenge to enforcement of the Award.

Offsetting Claim

135. This claim by Hi-Tech has not yet been litigated and is not to be determined as part of the issues to be resolved by this judgment. The only issue raised by this allegation at the moment is whether I should defer enforcement of the Award pending determination of this claim.
136. I am of the view that enforcement of the Award should not be delayed while this claim is heard and determined. My reasons are:

(a) The claim is problematic. There is an argument that it should have been brought forward in the arbitration and, because that was not done, it cannot now be litigated in this Court.

(b) In any event, there is no basis under the Act for refusing to enforce a foreign award or for delaying or deferring the enforcement of a foreign award because the party liable under the award has a set-off or offsetting claim against the other party.

137. I therefore decline to defer enforcement of the Award because of the alleged offsetting claim.

CONCLUSION

138. Hi-Tech has failed in all of its defences to UTL's arbitration claims. Accordingly, I will make a declaration of validity in respect of the Award and will enforce it by making an appropriate order for payment. 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.
139. I decline to defer enforcement of the Award and, therefore, will not stay the order for payment which I propose to make.
140. I will make interlocutory directions for the disposition of Hi-Tech's Cross-Claim, should it wish to pursue that Cross-Claim.
141. Hi-Tech must pay the costs of the proceeding to date.
142. The only orders which I will make at the moment are that, within seven (7) days of the date of this judgment, the parties are to file and serve an agreed set of declarations, orders and directions designed to give effect to these Reasons for Judgment. In the event that agreement cannot be reached within that timeframe, each party is to file and serve within ten (10) days of the date of this judgment its version of the declarations, orders and directions which it submits that I should make together with a brief Written Submission of no more than three pages in length in support of its version. I will then determine the form of relief on the papers. There will be orders accordingly.

I certify that the preceding one hundred and forty-two (142) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster.

Associate:

Dated: 22 February 2011
