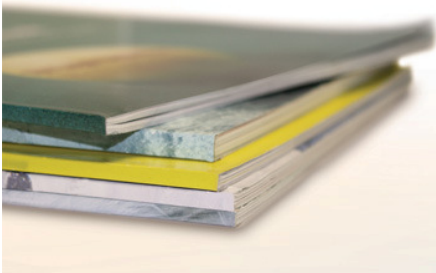


Enforcement of Arbitration Awards in the British Virgin Islands

As originally appeared in Resolution – Offshore, Winter 2010/11



BY ELIOT SIMPSON

A recent decision of British Virgin Island’s Court of Appeal has highlighted the limited discretion of the court when faced with a defence to an application to enforce an arbitration award.

The enforcement of arbitral awards in the offshore world is often simpler than the enforcement of judgments. Although offshore jurisdictions have regimes for the enforcement of foreign judgments, in most cases these apply only to judgments given in the United Kingdom and some Commonwealth jurisdictions. Otherwise it is necessary to enforce by an action on the judgment, requiring a new substantive proceeding to be commenced in which summary judgment will usually be available.

By contrast, these jurisdictions give effect to the **New York Convention on the Enforcement of Arbitral Awards 1958**, making the enforcement of **Convention** awards a relatively simple matter.

In the British Virgin Islands, the **Arbitration Ordinance 1976** provides for the enforcement of **Convention** awards. Enforcement can be resisted only on the limited grounds allowable under the **Convention**. These are incorporated in Section 36(2) and (3) of BVI's Ordinance.

Winding up Proceedings

In BVI, however, enforcement of foreign judgments and awards is usually achieved by way of winding up proceedings under the **Insolvency Act 2003**, with the concomitant disadvantage. In the case of awards the defendant can prevent enforcement by merely showing that there is a *bona fide* dispute on substantial grounds whether the award is enforceable.

These difficulties are exemplified by the recent decision of the Court of Appeal in **Grand Pacific Holdings Limited v. Pacific China Holdings Limited**.

In August 2009, Grand Pacific obtained an arbitration award in Hong Kong against Pacific China (a BVI company) for non-payment of a loan. Relying upon the award, in November 2009, Grand Pacific made an application for the appointment of liquidators, relying on the failure to pay the debt due on the award as evidence of insolvency. The application was heard by Mr Justice Bannister in the Commercial Court (Judgment dated 11 January 2010).

Disputed Debt

Pacific China's response to the application was that the debt was disputed *bona fide* on substantial grounds, due to shortcomings in the way in which the tribunal conducted the proceedings. Mr Justice Bannister expressed doubt that the debt could be disputed in this way: *“Until and unless the award is set aside, its existence, and therefore the existence of the debt which it affirms, cannot, it seems to me, be disputed.”* Nevertheless, he thought it right for the court to consider whether the dispute was substantial, noting that the holder of an unenforceable arbitral award would not be a creditor for the purposes of the Insolvency Act. He then went on to consider whether sufficiently substantial grounds had been identified by Pacific China to raise a real question whether the award was one that should be enforced. In doing so he had regard to the principles established in **Minmetals Germany GmbH v. Ferco Steel** [1999] 1 All ER 315.

Mr. Justice Bannister set out in his judgment a summary and analysis of the grounds on which

Pacific China asserted that the award was challengeable, including assertions that Pacific China had not been able to properly to present its case and that the tribunal had flouted the procedural protocol agreed between the parties. He found that the grounds were not so flimsy as to be incapable, on full argument in an application to set aside an order for enforcement of being developed, so as to give rise to a substantial dispute as to enforceability.

Mr Justice Bannister, however, went on to find that Pacific China's points could not be taken in isolation and must be considered in light of the tribunal's total reasoning and overall findings. He found that, even if there had been some unfairness, it could have had no impact on the outcome of the arbitration. On that basis, he went on to appoint liquidators to Pacific China.

Appointment of Liquidators

On 20 September 2010, the Court of Appeal gave judgment on Pacific China's appeal, overturning Mr Justice Bannister's decision and setting aside the order appointing liquidators.

The central issue considered by the Court of Appeal was the nature and extent of the discretion given to the court, by s36 of the **Arbitration Ordinance**, whether to enforce an award where a ground for refusing enforcement was made out. On this issue Grand Pacific referred to a series of Hong Kong cases suggesting that the court could enforce an award, even where a ground was made out for refusing enforcement, if the result of the arbitration

would not have been different notwithstanding the irregularity. These cases included **Paklito Investment Ltd v. Klockner East Asia** [1993] HKLR 39 and **Apex Tech Investment Limited v. Chuang's Development (China) Limited**, a decision of the Hong Kong Court of Appeal (CACV 000231/1995; 15 March 1996). This was consistent with the approach taken by Mr Justice Bannister in the Commercial Court.

Pacific China relied upon a line of English Court of Appeal judgments, including **Dardana Ltd v. Yukos Oil Co** [2002] 1 All ER (Comm) 819 and **Dallah Real Estate and Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan** [2009] EWCA Civ 755. These cases suggested that only a narrow discretion existed in applying s36.

Narrow Discretion

In overturning Mr Justice Bannister's decision, the Court of Appeal preferred the English line of cases. Justice of Appeal Janice George-Creque concluded:

“Accordingly, I would hold that the section 36(2) discretion is a narrow one in which a court is justified in overriding a Convention defence where there has

been waiver or circumstances giving rise to an estoppel on some such legally recognized principle or where, as Lord Rix LJ said in Dallah, the error is minor and prejudicially irrelevant.”

Prudence may therefore suggest that it will often be appropriate to obtain a local judgment first, in those cases where some *bona fide* dispute may exist in relation to the procedure adopted during the arbitral process. The award may be registered under the statute, and a BVI judgment obtained, before then seeking the appointment of liquidators relying upon the judgment; see for example the case of **Ingaseosas Industria de Gaseosas, SA v. Mark McDonald and Others** (27 July 2010).

ELIOT SIMPSON
Partner, Local Group Head – British Virgin Islands
esimpson@applebyglobal.com

This publication is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.

December 2010

© Appleby

Bahrain
Bermuda
British Virgin Islands

Cayman Islands
Guernsey
Hong Kong

Isle of Man
Jersey
London

Mauritius
Seychelles
Zurich