Enforcement Of Arbitral Awards In The Face Of A Pending Appeal Against A Set Aside Application At The Place Of Arbitration

By Jeremy Walton and Anna Gilbert at Appleby (Cayman) Ltd.

[Editor's Note: Jeremy Walton is a partner of leading offshore law firm Appleby, and head of its Dispute Resolution Group in the Cayman Islands. He is a member of the Chartered Institute of Arbitrators and Chairman of its Cayman Chapter. Anna Gilbert is an associate within Appleby's Dispute Resolution Group in the Cayman Islands. Any commentary or opinions do not reflect the opinions of Butler Pappas or Mealey's Publications. *Responses are welcome.]*

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the **New York Convention**), the enforcement of an arbitral award made in one New York Convention State in another New York Convention State is, generally, quick and straightforward. However, complications do arise. For example, what happens when (i) an arbitral award is made in country A, (ii) an application to set aside that arbitral award is made to the national courts of country A, and (iii) enforcement of the award is then sought in country B before determination of the application in country A? Furthermore, what happens when the application in country A is unsuccessful but an appeal is brought against that decision? That was the scene faced by the courts of the British Virgin Isles (**BVI**) and the Cayman Islands in *Conocophillips China Inc v Green Dragon Gas Ltd*, which raises interesting public policy issues. This article explores the reasons why different approaches were taken by the BVI and Cayman courts, and the approach which the offshore courts are likely to take in the future.

Statutory Rules On The Enforcement Of Foreign Arbitral Awards

The New York Convention provides an extensive enforcement regime, under which foreign arbitral awards *shall* be enforced by the New York Convention member states, and enforcement *may only* be refused in a limited number of enumerated exceptions. Its purpose is to facilitate the enforcement of awards, while at the same time upholding the generally recognised principles of justice and respecting the sovereign rights of member states. The exhaustive exceptions within Article V of the New York Convention are that:

> A party to the arbitration agreement was under some incapacity, or the arbitration agreement was not valid under the law to which the parties subjected it.
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> 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.
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> The award deals with a difference not contemplated by, or not falling within, the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.
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> The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, the law of the country where the arbitration took place.
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> 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, it was made.
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> The award is in respect of a matter not capable of settlement by arbitration.

It would be contrary to public policy to enforce the award.

In the Cayman Islands, the rules on enforcement of foreign arbitral awards are governed by the Arbitration Law (2012 Revision) (the **Arbitration Law**) and the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the **Enforcement Law**), which give domestic effect to the New York Convention. Pursuant to this statutory regime, *all* foreign (as well as domestic) awards are enforceable in the Cayman Islands subject to leave of the Cayman court, irrespective of the country in which the award was made and therefore whether it is a New York Convention award. The Cayman court may only refuse the enforcement of foreign arbitral awards on the limited grounds set out in the Enforcement Law, which mirror the exhaustive grounds listed in Article V of the New York Convention.

The grounds on which enforcement may be refused include the ground that "*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, it was made*" (section 7(2)(f) of the Enforcement Law). Where an application has been made to set aside or suspend an award in the country in which it was made, the Cayman court "*may, if it thinks fit, adjourn proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security*" (section 7(5) of the Enforcement Law).

In the BVI, identical rules on enforcement of foreign arbitral awards are contained in the Arbitration Ordinance 2013 (and, before that came into force on 1 October 2014, in its predecessor the Arbitration Ordinance 1976) (the **BVI Arbitration Act**).

Background Facts And Summary Of Decision

On 10 July 2013, Conocophillips China Inc (**CCI**), a Liberian company, obtained an award against Green Dragon Gas Ltd, a Cayman company, and its subsidiary, Greka Energy International BV, in an arbitration under the Rules of Arbitration of the Singapore International Arbitration Centre (**SIAC Rules**).

On 30 July 2013, Green Dragon and Greka applied to the High Court of the Republic of Singapore (the **Singapore High Court**) to set aside the award on the grounds that there had been a breach of natural justice and/or that they had been unable to present their case before the arbitral tribunal (the **Set Aside Application**). CCI nevertheless applied to both the Cayman and BVI courts for leave to enforce its award. CCI having obtained leave from the Cayman court on 10 September 2013 and from the BVI court on 26 September 2013, Green Dragon then brought applications to set aside the enforcement orders in each of the jurisdictions. On 17 February 2014, the Singapore High Court dismissed the Set Aside Application, and on 3 March 2014 Green Dragon appealed that decision (the **Appeal**).

The issue which therefore arose before the Cayman and BVI courts was whether enforcement of the award should be stayed, pending determination of the Set Aside Application and the subsequent Appeal, in Singapore.

In the Cayman Islands, the issue arose before the Set Aside Application had been determined. As set out above, Justice Foster granted leave to enforce the award in the Cayman Islands on 10 September 2013; Green Dragon applied to set aside or adjourn the enforcement order pending determination of the Set Aside Application, and CCI sought security for the full amount of the award. On 3 October 2013, Justice Foster ordered that Green Dragon's application to set aside the Cayman Islands enforcement award (and CCI's security application) be adjourned and that the award not be enforced in the Cayman Islands until the final decision of the Courts of the Republic of Singapore in respect of the Set Aside Application and related orders. In short written reasons, Justice Foster explained that the decision of the Singapore High

Court was expected imminently and there was no reason to suppose that the *status quo* would change in the interim.

In the BVI, the hearing of Green Dragon's application to set aside the BVI enforcement order was initially adjourned by consent until the outcome of the Set Aside Application in the Singapore High Court became known, so the issue only came before the BVI court for determination *after* the Set Aside Application to the Singapore High Court had failed, but before the Appeal had been determined.

On 16 April 2014, Justice Bannister in the BVI court dismissed Green Dragon's application. The court noted that the Set Aside Application had been determined against Green Dragon, and that the award was valid. The question was therefore whether enforcement of the award in the BVI should be stayed pending the outcome of the Appeal against the decision of the Singapore High Court. The court held that it should not, for the following reasons:

> An award under the SIAC Rules is not like a foreign judgment, where an appeal on the merits will decide the substance of a party's case. In the case of arbitral awards, the merits are conclusively pronounced upon by the arbitral tribunal itself. A foreign court asked to enforce an award therefore need only be concerned with whether there has been a failure of due process. Once the court in the place of arbitration (here the Singapore High Court) has removed any doubt about whether there had been a failure of due process, the holder of an award should not be prevented from enforcing the award worldwide simply because a different result might be obtained on appeal.
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> Since the award had been upheld by the Singapore High Court, the question of enforceability should be treated as concluded, regardless of the fact that an appeal was still ongoing.
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> The court rejected the argument that it should not enforce the award in circumstances where the award was not yet enforceable in the country of the place of arbitration, Singapore. There was no Singaporean authority before the BVI court on this point and the BVI court held that even if that was the case, and the effect of the Singaporean Rules of Court was that the award was at that stage unenforceable in Singapore, that cannot affect the position in the BVI, where the BVI court must exercise its discretion strictly in accordance with the terms of the BVI Arbitration Act.
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> The court also rejected the argument that the BVI enforcement order should be set aside as matter of comity. The court held that the correct application of the principles of comity was to uphold the decision of the Singapore High Court, rather than refuse to do so until it has been upheld by a higher court.

Justice Bannister queried whether it would, in fact, even be open to the BVI court to defer enforcement of an arbitral award in circumstances where the Set Aside Application had failed, as the BVI Arbitration Act provided that enforcement could only be refused on specific, exhaustive grounds reflecting the New York Convention. Justice Bannister expressed doubt that it would be legitimate to treat the words "*where an application for the setting aside or suspension of a convention award has been made*" as extending to a case where an application had been made, and lost, and the decision was being appealed. However, the BVI court did not go as far as deciding this point.

Commentary

Ease of enforcement under the New York Convention is one of main advantages of using arbitration as a means of international dispute resolution. The exhaustive exceptions within Article V of the New York Convention, listed above, have established a standard for achieving finality in international arbitration, and Article V was clearly meant to restrict the refusal of enforcement solely to these seven grounds.

The decision of *Conocophillips China Inc v Green Dragon Gas Ltd* was concerned with the exception for arbitral awards which have been set aside, suspended or have not yet become binding on the parties. The courts of the place of arbitration have primary jurisdiction to review an award once it has been made, and to determine its validity. That is, the only place where an arbitration award may be set aside or invalidated is at the place where the award was issued; i.e., the seat of arbitration. The New York Convention itself does not define "set aside" and the process of setting aside an award is entirely dependent on the procedural rules in the place of the arbitration, in this case Singapore.

The courts of other states have secondary jurisdiction and may only determine whether to enforce a foreign award in their jurisdiction. Under the New York Convention, a member state *may* refuse enforcement in circumstances where the award has been set aside, but there is no obligation to do so. Indeed, there has been much academic debate about whether a member state may still choose to an enforce award which has actually been set aside in the place of the arbitration, which raises interesting questions: should the courts of the place of arbitration have ultimate authority over arbitral awards with the result that annulled awards are unenforceable, or should awards be treated independently of the place of arbitration with the result that they are capable of enforcement regardless of being set aside?

Indeed, it is noteworthy that where there is an application on foot to set aside or challenge the award, the New York Convention provides that it is optional, not obligatory, for the courts of the place of enforcement to adjourn the proceedings pending the outcome of the application in the place of the arbitration. Arguably, if the decision of the courts in the place of the arbitration will necessarily be binding, then a stay would be necessary. In deciding whether to grant an adjournment, common law courts are likely to follow the approach taken in England (*IPCO v NNPC* [2005] EHC 726) and take into account factors such as:

- Whether the application challenging the award in the place of arbitration was brought *bona fide* and not simply as a delaying tactic.
- Whether the applicant challenging the award has a real prospect of success.
- The extent of the delay occasioned by an adjournment and any resulting prejudice.

The New York Convention therefore provides the courts in the place of enforcement with a supervisory jurisdiction to review awards, while limiting the right not to enforce them to certain cases. The New York Convention is perfectly neutral on whether awards set aside in the place of arbitration may be enforced: it neither requires their enforcement, nor does it bar such enforcement. It does not however address the situation where an award has been upheld by the lower court, but that decision is being appealed.

In our view, the approach taken by the BVI court in *Conocophillips* was correct. Three of the fundamental underlying principles in international arbitration are the fair resolution of disputes by an impartial tribunal without unnecessary delay; party autonomy; and the parties' intention to avoid excessive court intervention. A balance must be struck between the courts in both the place of arbitration and the place of enforcement exercising a supervisory role, and intervening too much so as to delay or undermine the arbitration process. The parties, having entered into arbitration proceedings, will have intended the arbitral tribunal, not a court, to hear the merits of the case, and will have intended the award to be recognised as binding and final between the parties once made. Any concern that due process had not been followed should be treated as removed by the decision of the Singapore High Court, and it would therefore have undermined the arbitration process for the enforcement of a final and binding arbitral award to have been halted by an appeal against the Set Aside Application.

Approaches Taken By The Cayman And BVI Courts

The decision by the BVI court to enforce the arbitral award before determination of the Appeal against the Set Aside Application is important, as it illustrates that the BVI court will honour the finality of arbitral awards once satisfied that due process has been followed, and indicates that the BVI court will interpret the grounds within Article V of the New York Convention narrowly, in order to facilitate the recognition and enforcement of foreign arbitral awards. It also serves as a useful reminder that the merits of an award cannot be revisited at the stage of its recognition and enforcement.

Although the Cayman court appears at first glance to have taken a different approach to the same issue, it must be remembered that the issue arose at different times before the courts. The issue came before the Cayman court in October 2013, *before* the Set Aside Application had been determined. The Cayman court exercised its discretion which it was entitled to do pursuant to section 7(5) of the Enforcement Law, and appears to have taken a sensible and pragmatic approach, given that the decision of the Singapore High Court was expected imminently and no prejudice would have been caused by adjourning the enforcement order for a short time. Indeed, it must be remembered that the Cayman court did not positively refuse to make an order for enforcement. As it happens, no further steps were taken to seek enforcement of the award in the Cayman Islands following determination of the Set Aside Application by the Singapore High Court, because the parties then settled. Had the issue arose at a later stage, once it was known that the Set Aside Application had been unsuccessful but before the Appeal had been determined, in our view the Cayman court would have been likely to take the same pro-enforcement approach as was taken in the BVI.