

Cayman Islands – Enforcement of Foreign Arbitral Awards

Introduction

The purpose of this briefing note is to consider the availability of, and procedure for, enforcement in the Cayman Islands of foreign arbitral awards.

Foreign arbitral awards have no direct operation in the Cayman Islands, so, for example, they cannot directly be enforced by execution. However, previously, awards made in states that are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") could be enforced within the Islands. Following the enactment of the Arbitration Law, 2012, (the "**Arbitration Law**") in July 2012, that jurisdiction has been significantly extended so that arbitral awards from any foreign state may be enforced pursuant to Cayman Islands statute, irrespective of whether or not the New York Convention is engaged.

Distinction between enforcement and recognition

A party to Cayman Islands proceedings seeks **enforcement** of a foreign award where it seeks to have the award executed or otherwise carried out as against the opposing party in the Cayman Islands (see Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed, para 14-003). A party seeks **recognition** where it seeks to rely on a foreign award, usually in its defence, in Cayman proceedings where the two sets of proceedings deal with the same issue as between the same parties, but the party does not seek execution of that award. Whilst an award must be recognised to be enforced, it does not need to be enforceable to be recognised (*ibid* para 14-002). This memorandum deals only with the enforcement of foreign awards.

Enforcement of foreign awards

Section 72 of the Arbitration Law provides that an award made by an arbitral tribunal may, with leave of the court, be enforced in the same manner as a Cayman judgment or order to the same effect, and where leave is so given; judgment may be entered in terms of the award. Further, Section 72(5) states that an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application to the Cayman court, shall be enforced subject to the procedural provisions of Sections 6 and 7 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the "**Enforcement Law**"). Therefore all foreign and domestic Cayman arbitral awards are now, subject to the leave of the Cayman court, enforceable through a straightforward process as if they were a Cayman judgment.

A party wishing to enforce a Convention award in the Cayman Islands should apply to the court for leave to do so by *ex parte* originating summons (following the procedural requirements in Article IV) (GCR O73 r4(1)). The application should be made to the Financial Services Division of the Grand Court (GCR O72 r1(2)(m)). Pursuant to Section 6 of the Enforcement Law, the party seeking to enforce a Convention award shall produce to the court:

1. the duly authenticated original award or a duly certified copy of it;
2. the original arbitration agreement or a duly certified copy of it; and
3. where the award or agreement is in a foreign language, a certified translation of it (certified by an official or sworn translator or by a diplomatic or consular agent).

These should be exhibited to an affidavit (GCR O73, r4(2)(b)). The affidavit should also state the name and place of abode or business of the applicant and the person against whom it is sought to enforce the award, and either that the award has not been complied with or the extent to which it has not been complied with at the date of the application (O73, r4(2)(d) & (e)). Service out of the jurisdiction of an originating summons for leave to enforce an award is permissible with the leave of the court whether or not the arbitration is governed by Cayman law (GCR O73, r5(2) and O11, r1(1)(m)).

Once leave to enforce is granted, the person against whom it is sought to enforce the award has 14 days within which to apply to set the leave aside (GCR O73 r4(4)).

Section 7 of the Enforcement Law sets down an exhaustive list of grounds on which enforcement of a Convention award may be refused under Article V. These are if:

1. a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
2. the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the law was made;
3. a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
4. 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;
5. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place;
6. 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 laws of which, it was made. (In *Terk Technologies Corporation v Dockery* 2000 CILR 196, it was held that where an award had been subject to earlier enforcement proceedings in a foreign court, the plaintiff could choose between applying for leave to enforce the award under the Enforcement Law and commencing an action at common law to enforce the foreign judgment. In *Republic of Gabon v Swiss Oil Corp* 1988-89 CILR N-1, it was held that "competent authority" refers to a body authorized to order suspension of an award, and does not include where a suspension comes about by the direct operation of the legislative rules governing applications to the appeal court. Note that the Cayman court is not compelled to refuse enforcement even if the award has been set aside by the local court, although it is submitted that it would normally do so in such circumstances);
7. the award is in respect of a matter which is not capable of settlement by arbitration; or
8. it would be contrary to public policy to enforce the award. It is likely only to be in unusual cases that this ground would be successful. In the English case of *Soleimany v Soleimany* [1999] QB 785, the English court refused to enforce an award due to the illegality of the intended performance (smuggling carpets out of Iran in breach of Iranian laws).

Absent the existence of one of these grounds, the court is obliged to enforce the award by reason of the mandatory language in Section 72(5) of the Arbitration Law.

Pursuant to Section 7(5) 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 adjourn the Cayman proceedings and/or order the person against whom the award is made to give security. (In *Terk Technologies Corporation v Dockery* 2000 CILR N-1 it was held that where an award has not yet been suspended or set aside by the foreign court, an application for a stay should be made under the court's inherent jurisdiction or under GCR O47, r1 which gave the court a wide discretion.)

Execution

A number of execution options are potentially available once leave has been granted to enforce an award in the same manner as a judgment (or once a Cayman judgment has been obtained pursuant to an action on an award). These include:

1. writs of *feri facias* (the seizure and sale of the judgment debtor's goods and chattels sufficient to satisfy the debt and costs of the execution);

2. garnishee proceedings (where a person indebted to the judgment debtor is required to pay moneys owed directly to the judgment creditor);
3. charging orders (providing to the judgment creditor security over the judgment debtor's assets);
4. the appointment of receivers; and
5. attachment of earnings orders (where a judgment debtor's salary is paid directly to the judgment creditor).

Winding up proceedings

An award creditor may be able to petition to wind up a Cayman Islands company based on a foreign arbitral award, on the basis that it is unable to pay its debts. This may be an alternative means of obtaining amounts owed from a Cayman-based award debtor. (In *re Lhasa Invs Ltd* [1996] CILR N-3 it was held that a company which had failed to satisfy a foreign judgment debt was unable to pay its debts under the applicable winding up provisions. It is submitted that there would be the same result where a company has failed to satisfy an arbitral award.)

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