

Lexis® PSL Arbitration Practice Note

Enforcing arbitral awards in the British Virgin Islands

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The Arbitration Act 2013

On 1 October 2014, the Arbitration Act 2013 (the new Act) came into force in the British Virgin Islands (BVI). The new Act replaces the Arbitration Ordinance 1976 (the old Act) and is a modern and long-awaited statute. The new Act is designed to remedy the shortcomings of the previous Act. It adopts the UNCITRAL Model Law, subject to some limited modifications and supplementation. As might be expected for a statute grounded in the concept of comity, the new Act expressly provides that in construing its terms the courts must consider its international origin and the need to promote uniformity in its application and the observance of good faith.

As a further complement to the implementation of the new Act, on 25 May 2014 the United Kingdom (after liaising with the Governor's Office and the Foreign and Commonwealth Office) extended the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 (the New York Convention) to the BVI. The new Act complies with the requirements of the New York Convention and awards from the BVI are now enforceable in other New York Convention states. This is a significant development. The previous non-enforceability of BVI awards outside of the BVI was described as a major shortcoming of the old Act.

The object of the Act is expressly: 'to facilitate and obtain the fair and speedy resolution of disputes by arbitration without delay or expense'. The new Act respects the freedom of parties to agree on how their disputes should be resolved, subject to the standard public interest safeguards.

The new Act also promotes minimal court interference in the arbitration of disputes and where interference is provided for the court must give regard to the wishes of the parties.

Although court interference is avowedly minimal, one area in which the BVI courts take centre stage is the recognition and enforcement of arbitral awards. As is well known, the BVI is the world's leading offshore incorporation centre with over one million BVI companies incorporated there. These companies themselves hold assets of immense value. As part of a global asset recovery strategy, enforcing creditors are often desirous of

enforcing their award against shares in a BVI company. To do this, the foreign award must be recognised in the BVI as a judgment of the BVI court. The significance of being able to enforce a foreign award in the BVI and the importance of understanding the rules and procedures governing the recognition and enforcement of arbitral awards in the BVI cannot be overstated.

The rules

Part X of the new Act regulates the recognition and enforcement of arbitral awards and unlike its predecessor introduces comprehensive provisions for the recognition and enforcement of both convention and non-convention awards. Notably, the definition of 'convention award' is now broad enough to include awards made (seated) in the UK which curiously had been expressly excluded from the old Act. The rules and procedures for the enforcement of convention and non-convention awards are identical and relatively straightforward, save for a few notable exceptions:

- the court may refuse to enforce a non-convention award for 'any other reason the Court considers it just to do so', this ground is not available where an applicant is seeking to enforce a convention award
- a non-convention award may only be enforced with leave of the court, a convention award may be enforced by both leave and instituting an action
- any convention award which is enforceable is treated as

binding for all purposes on the persons between whom it was made and may be relied on by any of those persons by way of defence, set off or otherwise in legal proceedings in the BVI.

That provision is absent in relation to non-convention awards. Section 81 of the new Act provides that an award whether made in the BVI or elsewhere is by leave of the court enforceable in the BVI in the same manner and has the same effect as a judgment or order of the court. Sub-section 2 provides that once leave is granted, judgment is entered in terms of the award. The only exception to the general rule is that during the period where a request for the court to decide on a challenge to an arbitrator is pending, the court may refuse to grant leave for the enforcement of an award made during that period by a panel which includes the arbitrator who has been challenged.

A further improvement from the old Act is the introduction in the new Act of a provision which states that leave of the court is required for any appeal from a decision of the court to grant or refuse leave to enforce an award (section 81(3)). Previously an appeal from a decision to grant or refuse leave to enforce an award was considered to be standard because that decision finally determined the issue in the claim namely whether the award should be enforced. The introduction of a requirement for leave preserves the principle of finality of decisions by ensuring that any intended appeal against a decision of a supervisory court has a realistic prospect of success.

Under section 83 (1) of the Act, a leave to enforce a non-convention award may be refused where:

- a party to the arbitration agreement was under some incapacity
- the arbitration agreement was not valid whether under the law to which it is subject or in the absence of same, the law where the award was made
- the person was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present their case
- the award dealt 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 the arbitration
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or where there was no agreement, not in accordance with the law of the country where the arbitration took place
- the order has not yet become binding on the parties or had been set aside or suspended
- if it is in respect of a matter which is not capable of settlement by arbitration under the laws of the BVI
- the award would be contrary to public policy to enforce the award
- for any other reasons the court considers it just to do so

Section 86 of the Act provides that enforcement of a convention award 'may not be refused' except in the cases mentioned in that section. The grounds for refusing to enforce a convention award

are identical to those for refusing to enforce a non-convention award. A notable exception is that the court does not have the power refuse to enforce a convention award 'for any other reasons the court considers it just to do so'. The absence of this general power to refuse to enforce an award coupled with the use of the words 'may not' makes it abundantly clear that the discretion to refuse to enforce a convention award is plainly very narrow.

Procedure

The procedure for enforcing a foreign award is also relatively straightforward. A convention award may be enforced in the BVI either by:

- instituting an action or
- by application seeking leave of the court

A non-convention award may only be enforced with leave of the court. The new Act simply requires that a party seeking to enforce a foreign award:

- produce authenticated originals or certified copies of the award and the arbitration agreement, and
- if the award or agreement is in a language other than the English language a translation of the award or agreement by an official or sworn translator or by a diplomatic or consular. This would be done by the diplomatic and consular agent in the jurisdiction where the translation from the foreign language into English is sought. This is unlikely to be the BVI and the time it takes would depend on the consular agent

To institute an action in the BVI, a party issues a Claim Form with a Statement of Claim or in specified cases a Fixed Date Claim Form supported by either a Statement of Claim or an affidavit.

If the person or entity against whom enforcement is sought is a foreign defendant then because this is an originating process, the claimant will need the permission of the court to serve the claim out of the jurisdiction on the foreign defendant. An application for permission to serve proceedings out of the jurisdiction may be filed once the proceedings have been issued and is typically determined within 7-21 days after filing. If there is a need to act urgently an order may be obtained within 48 hrs. Obtaining permission requires satisfying the court that the necessary gateway exists under part 7, there is a serious issue to be tried on the claim and that the BVI Court is the appropriate forum for the trial of the claim. While obtaining an order for service out is unlikely to be problematic on a claim to enforce a foreign award, to avoid having to apply for permission a beneficiary of an award should simply seek to enforce the award by applying for leave.

The Eastern Caribbean Supreme Court Civil Procedure Rules (the ECSC Rules) are procedural rules which apply to all civil proceeding in the Eastern Caribbean Supreme Court in any of the nine member states or territories of which the BVI is a part. Part 43.10 of the ECSC Rules sets out the procedure for applying to enforce foreign awards and expressly states that it has effect as to the:

- enforcement of an award not made by the court which is enforceable by virtue of a statutory provision as if it were an order of the court; and

- the registration of such award so that it may be enforceable as if it were an order of the court

Under rule 43.10(3) the general rule is that an application for permission to enforce an award or to register an order may be made without notice but must be supported by evidence on affidavit. The application is commenced by filing a Notice of Application.

Unlike in England, there is no bespoke form for commencing an application to enforce an arbitral award. Rule 43.10(5) further provides that the applicant must exhibit the award to an affidavit, give an address for service on the person against whom the applicant seeks to enforce the award and if the award is for the payment of money, certify the amount remaining due to the applicant.

A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again. Unlike the rules pertaining to the registration of judgments in the BVI, the rules providing for the enforcement of a foreign arbitral award do not prohibit the issue of execution where an application to set aside the order has been made. In those circumstances, it is well arguable that a judgment creditor may proceed to enforce the judgment against assets in the jurisdiction notwithstanding an extant application to have the order enforcing the award and providing for the registration of same, set aside.

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