

Enforcing arbitration awards in the British Virgin Islands

Conyers' Richard Evans gives an overview of the jurisdiction's rules and procedures

Given the ever-increasing use of arbitration in a myriad of commercial disputes, the all-important question arises as to the ease with which an arbitration award may be enforced. This may be of particular concern if the target assets are located (or believed to be located) offshore.

The British Virgin Islands (BVI) are known as a leading incorporation jurisdiction with something in the region of 400,000 active registered companies. Given the symbiotic relationship between arbitral tribunals around the world and jurisdictions where assets are held, it is useful to consider how easy it may be to enforce an award in BVI. For present purposes, we can assume that the target BVI assets are either a BVI incorporated company, or shares in a BVI incorporated company.

OVERVIEW TO ENFORCEMENT IN THE BVI

The good news is that by reason of the Arbitration Act 2013 (which has been in force since 1 October 2014) BVI, as a signatory to the New York Convention, has adopted the UNCITRAL Model Law on International Commercial Arbitration. Although the detail of the Arbitration Act lies outside the scope of this article, it is accurate to summarise the position by stating that BVI sensibly chose to adopt a classic form of the Model Law with very little derogation. Arbitration practitioners will therefore be very familiar with the broad concepts of enforcement.

Accordingly, the beneficiary of a Convention award may readily enforce it in the BVI, applying the well-established passport principles of enforcement. Similarly, a respondent may avail themselves of standard convention defences to enforcement. To date (both before and since the coming into force of the Arbitration Act), the BVI Commercial Court has adopted a pragmatic and pro-enforcement stance, while also fairly applying established principles under the Convention.

Under the Arbitration Act, non-Convention awards may also be enforced in the BVI. Defences/grounds for refusing enforcement are the same as those for Convention awards, but additionally, the court may refuse enforcement on the broader ground that it considers it just.

PROCEDURE

An application to enforce an arbitration award will generally be made *ex parte* under the BVI Civil Procedure Rules (BVI CPR). This approach will give

rise to issues of full and frank disclosure, and some applicants may prefer to make the application on at least some form of notice if practicable. There are requirements that will appear familiar in respect of the use of original or certified copies of core documents (including the arbitration agreement and award), although the BVI Court has shown itself to adopt a pragmatic approach to such formalities where it is appropriate. The BVI CPR makes express provision for service out of the jurisdiction, if required, for the enforcement of arbitration awards.

WHAT FORM OF ENFORCEMENT?

An application under the Arbitration Act and Convention to enforce an arbitration award, if successful, will render the award 'enforceable in the same manner as a judgment or order of the Court that has the same effect'. One must therefore consider how such an award/judgment is most effectively to be enforced. BVI offers a wide ambit of enforcement mechanisms for its orders, including, in the case of money judgments:

- charging orders.
- garnishee orders.
- orders for the seizure and sale of goods.
- the appointment of a receiver.

Charging orders may be a particularly effective and efficient means of enforcement over the shares in a BVI target company. An application is made, in the first instance, for a provisional charging order. It is made on an *ex parte* basis (and, again, will be subject to a duty of full and frank disclosure). Thereafter, at a hearing on notice to the respondent, the court will consider whether to make the provisional order final. In principle, and subject to timings, it may be possible to pursue an application for an order for sale at the same time as the hearing for the final order.

It is also worth noting that an arbitration award requiring the payment of a sum of money may be enforced (using that term in a practical, if strictly legally incorrect way) by way of liquidation proceedings in the BVI. Non-payment of the award (being an undisputed debt) provides a ground of deemed insolvency under the BVI Insolvency Act 2003. It is not necessary to take any steps otherwise to enforce the award (eg, by commencement of enforcement proceedings under the Arbitration Act).

INTERIM RELIEF

As may be expected, the Arbitration Act expressly permits the BVI Court to make interim orders in support of arbitration proceedings. The power extends to existing or intended arbitration proceedings, whether commenced inside or outside BVI. While potentially wide ranging in its scope, the court's powers are expressly circumscribed. Under the act, the court may decline to grant an interim measure on the ground that the interim measure being sought is currently the subject of arbitral proceedings and if the court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal. Moreover, in respect of overseas (actual or intended) arbitral proceedings, the BVI Court can only grant an interim measure if the arbitral proceedings are capable of giving rise to an arbitral award (interim or final) that may be enforced in BVI and the interim measure sought is of a type or description that may be granted in BVI by the court in relation to arbitral proceedings.

DISCLOSURE

Often, when considering how best to enforce an arbitration award in BVI, an early and essential issue is identification of likely targets and assets. While share registers and information as to beneficial ownership of BVI companies are held centrally, they are not available publicly. However, in certain cases (principally those based on fraud, or other serious breach of duty, and where a lack of propriety is properly alleged, for example in the context of freezing order relief) it may be possible to use the long-established Norwich Pharmacal jurisdiction to obtain disclosure orders against a target company's registered agent. The availability of such relief is to be determined very much on a case by case basis.

SUMMARY

As an important asset-holding jurisdiction, BVI has evolved a sophisticated and pragmatic regime for the enforcement of arbitration awards, well suited to the increased volume of such awards being published around the world.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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