

# International Corporate Rescue



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## Enforcement of Arbitration Award in Cayman: *MNC Media Investment Limited v Ang Choon Beng*

Paul Smith, Partner, and Ben Hobden, Associate, Conyers Dill & Pearman, Cayman Islands

The Cayman Islands has once again proved itself to be a favourable jurisdiction for those trying to enforce arbitration awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the NY Convention'), following a decision by the Court of Appeal in the matter of *MNC Media Investment Limited v Ang Choon Beng*. Paul Smith and Ben Hobden of Conyers Dill & Pearman acted on behalf of the successful Respondent.

The Appellant, MNC Media Investment Limited ('MNC'), was a holding company incorporated in the Cayman Islands that owns an electronic media products business carried on in the Peoples' Republic of China through a number of variable interest entities.

By a Put and Call option, made between the Respondent, Mr. Ang Choon Beng ('Mr. Ang') and the Appellant and two other non-Cayman Islands parties (cumulatively referred to as the 'Linktone Parties', Linktone being the former name of MNC), Mr. Ang agreed to grant the Linktone Parties a call option to purchase certain shares and the Linktone Parties granted Mr. Ang a put option to require the Linktone Parties to re-purchase the same shares.

Mr. Ang sought to exercise his put option requiring the Linktone Parties to re-purchase the shares to no avail, and subsequently commenced arbitration proceedings against the Linktone Parties in the Singapore International Arbitration Centre ('SIAC'). The SIAC Tribunal found in favour of Mr. Ang and in its partial award directed that Mr. Ang and the Linktone Parties complete the sale and purchase of the shares under the put option. The partial award did not make any provision for interest or costs, but gave Mr. Ang liberty to apply to the SIAC Tribunal should the need arise.

The Linktone Parties failed to comply with the partial award, so Mr. Ang made an application to the SIAC Tribunal for a consequential order for the procedure for the completion of the sale and purchase of the shares and sought an order for payment of costs and interest. Mr. Ang succeeded with these applications, the SIAC Tribunal making a final award in this regard.

Mr. Ang then set about enforcing the final award in the Cayman Islands. The matter first found itself before the Grand Court in November 2014 when Mr. Ang sought an order pursuant to section 5 of the

Foreign Arbitral Awards Enforcement Law (1997) Revision (the 'Law') for leave to enforce the final award of the SIAC Tribunal against MNC. The NY Convention applies to the Cayman Islands, and accordingly the procedure under the Law for enforcing NY Convention awards is one which is very straightforward and enforcement friendly. Following a brief *ex parte* application Mr. Ang was granted leave to enforce the final award.

Mr. Ang next presented a statutory demand against MNC (the 'Statutory Demand') under section 93 of the Companies Law, threatening to wind up MNC if the interest and costs awarded to him was not paid. The effect of section 93 of the Companies Law is that MNC would be deemed to be insolvent if the demand, for an undisputed debt, was not paid within 21 days.

MNC made an application to set aside the Statutory Demand on the basis that there was a genuine dispute as to whether the interest and costs were payable. It was argued by MNC that payment of interest and costs was not a joint and several obligation upon all of the Linktone Parties, but an obligation that was inextricably linked to the completion of the sale and purchase of the shares which was not activated until such time that the Linktone Parties elected one of themselves to be the payor and that the final award of the SIAC Tribunal should be construed accordingly. In the alternate, MNC contended that the final award was void for uncertainty and that the Statutory Demand should be set aside on that basis.

On the contrary, Counsel for Mr. Ang argued that the final award was plain and clear in its terms; there was a free standing joint and several obligation upon all of the Linktone Parties to make payment of the costs and interest ordered under the final award. It was argued that to place any other construction on the final award would be to defeat its purpose.

The parties were in agreement as to the applicable law; the Grand Court should give the final award its plain and obvious meaning. What fell to be decided was exactly what that plain and natural meaning was.

In his judgment dated 4 August 2015, Jones J. preferred the construction of Mr. Ang, dismissing the application brought by MNC. The Statutory Demand was upheld and was not set aside. MNC appealed the

decision of the first instance court and the matter was heard by the Court of Appeal on 13 November 2015.

The arguments that had been made at first instance were repeated before the Court of Appeal, together with a new argument that it was wrong for the enforcing court to adopt principles of construction under national law when interpreting the award. Instead, it was argued, the enforcing court should construe the award autonomously, without regard to national law, in order to ensure transnational uniformity of interpretation of an award.

Once again the interpretation of the final award proffered by Mr. Ang was preferred. In its brief judgment, the Court of Appeal dismissed MNC's application, opining that Mr. Ang's construction gave 'proper effect to the wording of the Final Award as a whole'. The decision of the Court of Appeal accepted that the enforcing court should adopt a principle of minimal curial intervention

as regards a NY Convention award, meaning that the enforcing court should adopt a mechanistic approach to the construction of the award and give it its 'plain and obvious meaning'. In particular, the Court of Appeal held that the enforcing court should give the award an autonomous interpretation without regard to rules of construction under national law. As Field JA. held 'It was not for the court to improve the award or to strive to construe it having regard to commercial considerations'. The enforcing court should not adopt the normal rules of construction of Cayman Islands law, under which the court can adopt a commercial purposive approach to construction.

The decision of both the Grand Court and Court of Appeal is a victory for common sense and confirms that the Cayman Islands remains a friendly jurisdiction for those trying to enforce rights pursuant to arbitration awards.

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