New York Convention provisions on stay trump BVI Arbitration Act

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Arbitration analysis: The British Virgin Islands High Court has stayed court proceedings in the case of Hualon Corporation (M) SDN BHD v Marty Limited in favour of Singapore International Arbitration Centre (SIAC) arbitration. Tameka Davis, counsel in the litigation department of Conyers Dill & Pearman in the British Virgin Islands, considers the decision.

Original news

Hualon Corporation (M) SDN BHD (in receivership) v Marty Limited

A copy of the judgment can be found here.

What was the background to the case?

The case involved an application by the claimant, Hualon Corporation (M) SDN (in receivership) (acting by its receiver and manager Mr Duar Tuan Kiat) to stay proceedings it had commenced in the British Virgin Islands (BVI) in favour of SIAC arbitration. The subject matter of the dispute in the BVI had been subject to an arbitration clause which the receiver only became aware of once Hualon had issued its claim. The defendant, Marty Limited, a BVI incorporated company, opposed the application on the basis that Hualon had taken substantive steps in the jurisdiction (eg by issuing the claim and actively participating in interlocutory applications) and in doing so had elected to litigate here. This election, maintained the defendant, rendered the arbitration clause 'inoperative' under section 18 (1) of the Arbitration Act 2013 (the Act). The BVI Arbitration Act adopts the UNCITRAL Model Law, subject to limited modification and supplementation. Reference to the Act therefore includes reference to the relevant Model Law. [Section 18(1) of the Act reproduces Article 8 of the Model Law.]

What did the judge decide?

The judge in his 70-page judgment granted the application for a stay with various consequential orders and in so doing found that:

- Hualon did not know about the arbitration clause before issuing its claim, was not wilfully blind to it and therefore could not have elected litigation in the BVI over SIAC arbitration
- article II(3) of the New York Convention which provided for a stay (without limitation as to the timing of when the applicant's first statement on the substance of the dispute was submitted) should 'trump' s 18 of the Act, which had such a limitation
- even if the New York Convention did not apply, it is arguable that s 18 of the Act was intended to apply to statements beyond that of the issuance of a claim
- alternatively, and if neither s 18 of the Act nor art II(3) of the New York Convention were applicable, the court had the inherent jurisdiction to stay its proceedings and this was one such case where the court would do so

The court further held that when a court is requested to refer parties in court proceedings to arbitration and to stay the court proceedings based on an arbitration agreement between the parties the court should only undertake a prima facie review as opposed to making an actual determination (ie the full merits approach favoured by English courts) of the existence and scope of the arbitration clause. In any event, the court determined that on a full merits review approach the arbitration clause was not inoperative.

What was the judge's reasoning?

The learned judge determined, inter alia, that:

- implicit in the concept of election and waiver was knowledge of the alternatives and the circumstances. The lack of knowledge or awareness of the arbitration clause by Hualon could therefore not preclude a referral to

arbitration and a stay of the claim
- o although s 18 of the Act provided for a request for arbitration to be made no later than when the applicant submitted its first statement on the substance of the dispute, the New York Conventions own mirror provision, art II(3), did not provide for such a limitation. The provisions of the New York Convention should apply in priority to s 18 of the Act for two reasons. First, applying the broader referral to arbitration provision in the New York Convention was more consistent with the public policy of the BVI favouring arbitration. Second, applying the referral to arbitration provision in art II (3) of the New York Convention will result in the territory complying with its international treaty obligation made to all other members of the New York Convention
- o in any event, the reference to 'substance of the dispute' in s 18 could arguably be taken to mean the formulation of the claim beyond that of issuing a claim
- o preferring the prima facie over the full merits review approach supported the BVI's public policy in the interpretation and application of the Act and the New York Convention, particularly the latter approach would emasculate the kompetenz-kompetenz principle, while the former is a robust recognition and enforcement of it
- o alternatively, even if the mandatory stay provisions of the Act or the Convention did not apply, the court should stay the BVI proceedings exercising its inherent jurisdiction. This jurisdiction was not ousted by the mandatory provisions of the Act or the New York Convention and indeed was a valuable tool to aid in the implementation of the public policy favouring arbitration where staying arbitration was desirable but not possible under the other provisions

What is the significance of the decision for the BVI as a pro-arbitration jurisdiction?

The judgment has not only reaffirmed the BVI's historical pro-arbitration stance but has made it even more pronounced by finding that the New York Convention's provision on stay will 'trump' s 18 of the Act, thereby offering a broader opportunity for requesting a mandatory stay from the BVI courts.

What are the practical implications for parties faced with court proceedings in the BVI but with an arbitration clause in their contract?

Parties with arbitration clauses in their contract will still benefit from the mandatory stay provisions but perhaps in more flexible circumstances than previously contemplated. Parties would also benefit from the court's inherent jurisdiction to grant a stay in favour of arbitration even if the circumstances do not fall squarely within the Act or the New York Convention.

If the first date on the judgment (18 May 2015) was the date of the hearing and the second date (8 April 2016) is the date of delivery of the judgment, what was the reason for the delay?

One cannot speculate on the reason for the delay in handing down this particular judgment but the judgment is lengthy, examines a number of complex areas of arbitration law and relies on many cases from other parts of the commonwealth. The commercial judge has delivered a number of judgments in the past few months. Issues of delay (above that which can be expected) are at this stage largely historic. Currently, in addition to Justice Leon, we have two other temporary commercial judges sitting in the BVI, Justice Sher QC, a notable Queens Counsel from a strong commercial set, Wilberforce Chambers, and Justice Gerhard Wallbank, an experienced commercial practitioner who has acted in a judicial capacity previously and notably on the *Stanford* cases in Antigua. The BVI Commercial Court now more than ever has the width and depth of expertise and capacity to deal with the most complex commercial disputes efficiently.

How is BVI progressing in setting up an arbitration centre?

The cabinet appointed the first board of The BVI International Arbitration Centre (the IAC) on 7 September 2015. The chairman of the board, Mr John Beechey is an independent arbitrator and former president of the ICC International Court of Arbitration. The naming of the board has created further impetus to put in place the infrastructure to get the IAC up and running. A CEO has been appointed and the IAC has now secured two floors in a state of the art facility on the main island. Floor plans are finalised and the centre is scheduled to open for business in the autumn.

PSL practical point: *From 13 June to 10 July 2016, Hon Sir Bernard Eder QC will take over Justice Sher QC's temporary appointment.*

Tameka Davis is counsel in the litigation department of Conyers Dill & Pearman in the British Virgin Islands, where her practice includes international insolvency, bringing and defending unfair prejudice, breach of contract, conspiracy and asset tracing claims, the recognition and enforcement of foreign judgments and arbitral awards, obtaining and resisting interim relief including disclosure and urgent injunctive relief. She appears in the Commercial Division of the High Court of the Virgin Islands and the Court of Appeal. She is the BVI contributor to LexisNexis PSL Arbitration module and has been recognised in the 2015 edition (and since 2012) of Legal 500 Caribbean (dispute resolution). She sits on the Restructuring & Insolvency Specialist Association technical committee and is the BVI contributing editor to the firm's Offshore Case Digest. She has authored many articles and is the co-author of the BVI Chapter of the European Lawyers Reference Series of International Civil Fraud Jurisdiction comparison, December 2013. Tameka is a member of the Chartered Institute of Arbitrators (CIArb) and the secretary for the BVI Chapter of CIArb. Tameka is a director of the Women's Offshore Network (WON) and was recently named by Global Restructuring Review as one of their global top 40 under 40 in restructuring and litigation.

Interviewed by Jane Crinnion.

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