The Enforcement of International Arbitral Awards in the Cayman Islands

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This article discusses the rules applicable to the enforcement of international arbitral awards in the Cayman Islands pursuant to the Arbitration Law 2012 and related legislation with particular reference to Asia-seated awards involving Cayman entities and Cayman law.

Introduction

The year 2022 marks the tenth anniversary of the enactment of the Cayman Islands' Arbitration Law 2012 (the 2012 Law). The 2012 Law is based on the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration. Its enactment brought arbitration law and practice in the Cayman Islands into line with internationally recognised standards. It is more than just coincidence, therefore, that the Cayman Islands, as a major jurisdiction for international business, is witnessing an increasing number of *ad hoc* international arbitrations.

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Even more significantly, the courts of the Cayman Islands are now handling a significant number of applications for the recognition and enforcement of international arbitral awards against Cayman Islands entities or against assets held or located there. There are also an increasing number of court applications for interim relief or assistance in aid of foreign arbitrations or arbitral enforcement proceedings.

Hong Kong International Arbitration Centre's recent case statistics reveal that, of the 514 cases submitted to it for resolution in 2021, corporate entities established in the British Virgin Islands and the Cayman Islands respectively made up the third and fourth groups of users by geographical origin.

Cayman Islands law is, in turn, reported to be the fifth most commonly selected governing law for the resolution of those disputes, with Hong Kong law and English law being the two most commonly selected governing laws respectively.

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Singapore International Arbitration Centre's case statistics for 2020 reveal, in turn, that corporate entities established in the Cayman Islands now rank in the top 20 user groups of SIAC's dispute resolution facilities.

The China International Economic and Trade Arbitration Commission (CIETAC) 2020 *Work Report* does not list user groups by geographical origin, but an increasing number of CIETAC cases are described as 'foreign-related cases' and, in practice, an increasing number of CIETAC arbitrations involve Cayman Islands entities as well as the governing law of the Caymans.

One reported example is *La Dolce Vita Fine Dining Co Ltd v. Zhang Lan, Grand Lan Holdings Group (BVI) Ltd and Qiao Jiang Lan Development Ltd (formerly named as South Beauty Development Ltd).*[1] The CIETAC arbitration tribunal in that case awarded sums in the region of US$142 million in favour of two Cayman Islands companies. The awards handed down have resulted in enforcement proceedings in the courts of Hong Kong, China and the United States.

The enforceability of HKIAC, SIAC and CIETAC arbitral awards in the Cayman Islands

The basic requirements for enforcement of international arbitral awards in the Cayman Islands are contained in the Cayman Islands' Foreign Arbitral Awards Enforcement Law 1975 (1997 Rev Ed, the Enforcement Law), as well as s 72 of the Arbitration Law and Order 73 of the Grand Court Rules 1995 (2003 Rev Ed). These instruments set out the main substantive and procedural requirements for enforcing foreign arbitral awards in the Cayman Islands.

The Enforcement Law and the Arbitration Law both give effect in the Cayman Islands to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Their principles will therefore be familiar to any lawyer or arbitrator with an understanding of that convention.

Section 5 of the Enforcement Law provides that foreign arbitral awards are enforceable in the Cayman courts in the same manner as domestic arbitral awards. They will therefore be treated as binding for all purposes on the persons in respect of whom they were made, and accordingly may be relied upon by way of defence, set-off or otherwise in any legal proceedings.

Under section 7(1) of the Enforcement Law, and in accordance with art V of the New York Convention, enforcement of a foreign arbitral award "shall not be refused" by the Cayman Islands courts except in cases where it is proved that:

(1) a party to the arbitration agreement was under some incapacity under the law applicable to it;
(2) the arbitration agreement was invalid under the law applicable to it;
(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 its 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 law of which, it was made; or

(7) the award is in respect of a matter which is not capable of settlement by arbitration, or it would be contrary to public policy to enforce the award.

Recent case law on the enforcement of foreign arbitral awards in the Cayman Islands

On 8 and 9 March 2022, the Judicial Committee of the Privy Council heard an appeal from the Cayman Islands Court of Appeal in *Gol Linhas Aéreas SA (formerly VRG Linhas Aéreas SA) v MatlinPatterson Global Opportunities Partners (Cayman) LLP and others*. The Privy Council's judgment has been reserved, but it is eagerly awaited by arbitration lawyers in both the Cayman Islands and jurisdictions with similar enforcement legislation based on the New York Convention.

The issues in the appeal also engage a long-standing debate between 'common law' and 'civil law' jurisdictions regarding the circumstances in which arbitral tribunals can apply the civil law principle of *iura novit curia* (the court knows the law) without hearing full argument from all of the parties or their lawyers.

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The *Gol Linhas* appeal relates to the Cayman Islands Court of Appeal's decision to enforce a multi-million dollar ICC award in the Caymans in favour of a Brazilian airline, despite the fact that the arbitral tribunal had decided the case on a ground not argued by the parties (and despite the first instance Cayman Islands judge's decision not to enforce the award there). The Brazilian Court of Appeals had already refused to set aside the award as a matter of Brazilian law, on the basis that the arbitral tribunal had the power to determine issues as it saw fit, having regard to the *iura novit curia* principle.

A final appeal to the Brazilian Supreme Court was pending at the time the Cayman Islands Court of Appeal came to consider the enforceability of the award in the Caymans. The Court of

Appeal therefore ordered a stay of enforcement pending the Brazilian Supreme Court's final judgment.

Although the Cayman Islands Court of Appeal acknowledged that the *iura novit curia* principle does not sit comfortably with common lawyers' perceptions of fairness, it held that enforcement of the award was, on balance, in accordance with Brazilian law and not contrary to Cayman Islands public policy and due process. The Court noted, in particular, that the *iura novit curia* doctrine was widely accepted in a number of civil law jurisdictions and was not, in and of itself, contrary to public policy, due process or natural justice. The Privy Council will have to reconsider these issues in its judgment in due course.

Recent Cayman case law on interim relief in aid of foreign arbitrations

The Cayman courts have repeatedly demonstrated their willingness to grant interim relief in aid of foreign arbitrations and arbitration enforcement proceedings in appropriate circumstances in a number of recent judgments. Two recent examples from the Grand Court are particularly noteworthy.

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Firstly, in *ArcelorMittal North America Holdings LLC v Essar Global Fund Ltd*,[2] Kawaley J declined to set aside a *Norwich Pharmacal* order that had previously been granted by the Grand Court in aid of the enforcement of an ICC arbitral award, and which had been upheld by the Cayman Islands Court of Appeal.[3]

Secondly, in *In the matter of the Kuwait Ports Authority*,[4] Parker J gave directions under the Cayman Islands' Confidential Information Disclosure Law 2016 that the Kuwait Ports Authority was at liberty to disclose a variety of confidential documents relating to the affairs of a Cayman Islands exempted limited partnership to the State of Kuwait for use by the latter in evidence in an ICSID arbitration under a Bilateral Investment Treaty with an individual, Maria Lazareva.

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Conclusion

As mentioned previously, an increasing number of Cayman Islands-related arbitrations are likely to be held in Asian jurisdictions and before Asian arbitral institutions. The courts of the Cayman Islands remain ready and willing to assist award creditors with the recognition and enforcement of Asian-seated arbitral awards in the Caymans in appropriate circumstances, having regard to the provisions of the 2012 Law, the Enforcement Law and the case law summarised above.

1 CIETAC Case No S20150473.
2 FSD 2 of 2019,
3 CICA Civil Appeal No 15 of 2019.
4 FSD No 18 of 2021,