



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD NO 387 OF 2023 (IKJ)

**IN THE MATTER OF SECTION 5 OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT
ACT (1997 REVISION)**

**AND IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF A SWISS
CHAMBERS' ARBITRATION INSTITUTE ARBITRATION AWARD DATED 18 DECEMBER
2017 IN CASE NO. 600413-2015**

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr Andrew S. Jackson and Ms Yuan Wen of Appleby (Cayman) Ltd.,
for the Plaintiff

Heard: On the papers

Date of decision: 27 February 2024

Draft Judgment Circulated: 28 February 2024

Judgment Delivered: 8 March 2024

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Ex parte application for leave to enforce a foreign arbitration award made in a New York Convention country-procedural requirements-Foreign Arbitral Awards Enforcement Act (1997 Revision) section 5-Grand Court Rules Order 73 rules 31-32

REASONS FOR DECISION

Introductory

1. By *Ex Parte* Originating Summons dated 15 December 2023, the Applicant applied for leave to enforce a Final Award of the Swiss Chambers' Arbitration Institution against the Respondent (the "Final Award"). The Final Award was executed by the panel on 18 December 2017 and delivered to the parties on 19 December 2017. The *ex parte* hearing was listed for 27 February 2024 in Chambers. On 26 February 2024, I indicated to counsel that, having reviewed the application, I considered it appropriate for disposition on the papers without an oral hearing and promised to give short reasons for my decision.
2. On 27 February 2024, I granted the Applicant leave to enforce the Final Award and made an Order substantially in terms of the draft set out at the end of the Hearing Bundle. These are the reasons for that decision.

Governing legal principles

3. The Foreign Arbitral Awards Enforcement Act (1997 Revision) (the "FAAEA") provides as follows:

"5. A Convention award shall, subject to this Law, be enforceable in the Grand Court in the same manner as an award under section 22 of the Arbitration Law (1996 Revision) and shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Islands and any reference in this Law to enforcing

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a Convention award shall be construed as including references to relying upon such award...

Refusal of enforcement

7. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in subsections (2) and (3).

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves —

- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;*
- (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;*
- (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*
- (d) subject to subsection (4), that 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;*
- (e) that 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; or*
- (f) that 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.*

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in paragraph (f) of subsection (2), the court, before which enforcement of the award is sought, may, if it thinks fit, adjourn proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security”

4. Section 6 requires original or duly certified copies of the award and the arbitration agreement to be placed before the Court, together with certified translations of awards in a foreign language. Section 7 implements Article V of the New York Convention on the Reciprocal Enforcement of Arbitral Awards under which there is a clear presumption in favour of enforcement. Enforcement may only be refused if the respondent to an application “*proves*” one of the following grounds:
- (a) a party to the arbitration agreement was under some incapacity;
 - (b) the arbitration agreement was invalid;
 - (c) the respondent was unable to present their case;
 - (d) the award contains improperly submitted matters;
 - (e) the composition of the tribunal was not as agreed or in accordance with the laws of the arbitral forum;
 - (f) the award is not yet binding or has been set aside or suspended by a competent court of the arbitral forum;
 - (g) the award contains matters not capable of being submitted to arbitration or there are public policy grounds in the enforcement forum for declining to enforce the award.
5. In *Al Haidar-v-Rao*, FSD 328/2022 (IKJ), Judgment dated 3 February 2023 (unreported), furnishing reasons for my *ex parte* decision on the papers, I summarised the legal policy principles underpinning this statutory jurisdiction as follows:

“4. In Lam Global Management Ltd. II and Lam Global Management Ltd. III-v-AGPL Investment Ltd., FSD 226/2022 (IKJ), Judgment dated 13 December 2022 (unreported), I considered the legal principles governing granting ex parte leave to enforce a final foreign award under section 5 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) (the ‘FAAEA’). In paragraph 8 of my Judgment in that case, I noted that: ‘An ex parte application is expressly provided for. The pro-enforcement policy of the New York Convention is well recognised by this Court and understood.’ I cited the observation of Martin JA in Essar Global Fund Ltd v Arcelormittal USA LLC [2021 (1) CILR 788] that

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‘[i]n the majority of cases, obtaining leave to enforce an award is a straightforward matter’ (at paragraph 14).

5. The grounds for refusing enforcement are limited, should be construed narrowly and the respondent will bear the burden at any inter partes hearing of demonstrating that such grounds are made out: Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) v MatlinPatterson Global Opportunities Partners (Cayman) II LP and Others [2022] UKPC 21 (per Lord Hamblen and Lord Legatt at paragraph 23).”

6. In *Al Haidar*, the Court was preoccupied at the *ex parte* stage with the substantive question of whether section 5 of the FAAEA applied to interim awards. Only passing reference was made to the procedural requirements for applications under section 5. In the present case, where no substantive legal issues appear to arise, it is helpful to make some mention of the procedural scheme. Section 6 of the FAAEA provides:

“Evidence

6. The party seeking to enforce a Convention award shall produce —

- (a) the duly authenticated original award or a duly certified copy of it;*
- (b) the original arbitration agreement or a duly certified copy of it; and*
- (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.”*

7. GCR Order 73 rule 31 provides as follows:

“Enforcement of awards (O. 73, r. 31)

31. (1) An application for leave under Section 52 or 72 of the 2012 Law or under Section 5 of the 1975 Law to enforce an arbitral award, shall be made by ex-parte originating summons.

(2) The Court hearing an application under paragraph (1) may direct that the application is to be served on such parties to the arbitration as it may specify and service of the

application out of the jurisdiction is permissible with the leave of the Court irrespective of where the award is, or is treated as, made.

(3) Where a direction is given under paragraph (2), rules 11 and 13 to 17 shall apply with the necessary modifications as they apply to applications under Part I of this Order.

(4) Where the applicant applies to enforce an agreed award within the meaning of section 62 of the 2012 Law, the application must state that the award is an agreed award and any order made by the Court shall also contain such a statement.

(5) An application for leave must be supported by an affidavit —

(a) Exhibiting —

(i) where the application is under Section 52 or 72 of the 2012 Law, the arbitration agreement and the original award or, in either case, a copy thereof;

(ii) where the application is made under Section 5 of the 1975 Law, exhibiting the documents specified in Section 6 of the 1975 Law.

(b) stating the name and usual or last known place of residence or business of the applicant and of the person against whom it is sought to enforce the award respectively;

(c) stating as the case may require, either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

(6) An order giving leave must be drawn up by or on behalf of the applicant and must be served on the respondent by delivering a copy to the respondent personally or by sending a copy to the respondent at the respondent's usual or last known place of residence or business or in such other manner as the Court may direct, including electronically.

(7) *Service of the order out of the jurisdiction is permissible without leave, and Order 11, rules 5 to 8, shall apply in relation to such an order as they apply in relation to a writ.*

(8) *Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the Court may fix, the respondent may apply to set aside the order and the award shall not be enforced until after the expiration of that period or, if the respondent applies within that period to set aside the order, until after the application is finally disposed of.*

(9) *The copy of the order served on the respondent shall state the effect of paragraph (8).*

(10) *In relation to a body corporate this rule shall have effect as if for any reference to the place of residence or business of the applicant or the respondent there were substituted a reference to the registered or principal address of the body corporate.*

Nothing in this rule shall affect any enactment which provides for the manner in which a document may be served on a body corporate.

Interest on awards (O. 73, r. 32)

32. (1) *Where an applicant seeks to enforce an award of interest, the whole or any part of which relates to a period after the date of the award, the applicant shall file an affidavit giving the following particulars —*

(a) whether simple or compound interest was awarded;

(b) the date from which interest was awarded;

(c) the rate of interest awarded; and

(d) a calculation showing the total amount claimed up to the date of the affidavit and any sum which will become due thereafter on a per diem basis.

(2) The affidavit under paragraph (1) must be filed whenever the amount of interest has to be quantified for the purpose of obtaining a judgment or order under Section 52 or 72 of the 2012 Law or under Section 5 of the 1975 Law, or for the purposes of enforcing such a judgment or order by one of the means mentioned in Order 45, rule 1.”

8. The key elements of the statutory procedural scheme can be summarised as follows:

- (a) applications to enforce awards under, *inter alia*, section 5 of the Act may be made and granted on an *ex parte* basis;
- (b) the Court may require service of the application rather than dealing with it on an *ex parte* basis. If the Court does direct service of the application, the more prescriptive requirements for service under Part I of Order 73 rule 31 apply;
- (c) the supporting affidavit must exhibit the documents required by section 6 of the FAAEA (originals or certified copies of the arbitration agreement and award, with translations of foreign language documents);
- (d) the affidavit must state the last known address of the respondent;
- (e) the affidavit must explain the extent to which, if any, the award has been complied with;
- (f) service of the order abroad is permissible without leave, however Order 11 rules 5-8 apply by analogy with the writ position (this means that there will be a need to ensure that service is carried out in accordance with the law of the service jurisdiction and that service through official channels is not required, unless a straightforward form of service has been agreed);
- (g) the order must state the time fixed for applying to set it aside; and
- (h) the relevant address to be described for companies is the registered or principal office.

9. The Applicant's counsel accurately summarised the substantive and procedural requirements in their Skeleton Argument, and as regards the latter referred to my own decision in *Arcelormittal USA-v-Essar Steel Limited et al*, FSD Nos 2 and 74 of 2019, Judgment dated 2 July 2019 (unreported) (at paragraph 22) where what I described as "*a self-contained procedural code*" was briefly referenced. The only additional common law requirements, which is superimposed over these statutory requirements, are the duties attached to every *ex parte* application, which must be fairly presented and make full and frank disclosure. In the context of applications to enforce foreign arbitration awards, those duties should in most cases be easier than it ordinarily is to discharge because:
- (a) once a *prima facie* case for granting leave is made out, there is effectively a presumption in favour of enforcement; and
 - (b) only eligible grounds which are obviously strong at the leave stage are likely to undermine the merits of the application.
10. The duty of full and frank disclosure will in most cases be satisfactorily discharged by informing the Court:
- (a) whether any application has been to the curial court, or any other competent court, to set aside the award (and if so, the result or other status of the proceedings); and
 - (b) what grounds for refusal, if any, have been or could be raised by the respondent.

Merits of the present application

11. The present application was almost a text book case for granting leave to enforce at the *ex parte* stage. The Applicant, through its supporting evidence:
- (a) produced certified copies of the arbitration agreement and the Final Award, with translations of the foreign language originals;
 - (b) averred that the amounts due were still outstanding;

- (c) quantified the interest element of the claim to the date of the deponent's affidavit;
 - (d) described the Respondent's last known address;
 - (e) addressed each potential ground for refusal and briefly explained why the Applicant considered the grounds did not properly arise, in circumstances where the Respondent had fully participated in the arbitral proceedings and had not applied to set aside or suspend the Final Award in a period covering more than six years;
 - (f) placed before the Court the key documents relating to the Applicant's successful enforcement proceedings in the United States, which the Respondent unsuccessfully resisted; and
 - (g) (in counsel's Skeleton Argument) explained that: "*If the Court proceeds to make the Enforcement Order ex parte at this hearing, it is further confirmed that Appleby are instructed to proceed as promptly as possible to effect service on the Respondent, as required by GCR O.73, r.31(6).*"
12. The submission as to the legal basis on which service would be effected signified that counsel had identified the correct legal basis for service without leave of the Order, which was the direction the *Ex Parte* Summons clearly sought. There was no formal need to address the service methodology through evidence as the Court was not being invited to direct some other means of service than the primary means prescribed by the Rules. However, this was a case where the Respondent is a foreign government and is a civil law jurisdiction. In my judgment, in such cases where it not obvious that private service by delivery to an appropriate address will be valid under the relevant local law, it is desirable that the proposed mode of service be explained by the applicant.
13. The other quibble I had with the application is that the draft Order sought to fix the standard 14 days for the Respondent to apply to set it aside. The supporting evidence gave no basis for the Court being satisfied that this period was a reasonable one, bearing in mind that there was no apparent basis for assuming that Cayman Islands counsel had already been retained. It was clear from the United States enforcement proceedings that the Respondent has no apparent difficulty in instructing counsel, although I was unable to ascertain within what time-frame some legal response was actually made. The starting assumption should ordinarily be that serving or giving notice to a party

overseas will justify an extension to the standard response time applicable to parties within the jurisdiction. GCR Order 73 rule 21 (8) implies this when it states:

“Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the Court may fix, the respondent may apply to set aside the order...” [Emphasis added]

14. That said, the fact that one attempt to resist enforcement had already been rejected by another court made it seem implausible that any seriously arguable grounds for setting aside the *Ex Parte* Order I had decided to grant would be advanced to this Court. Accordingly, I directed that the Respondent should have 21 days to apply to set aside the *Ex Parte* Order.

Summary

15. For these reasons, on 27 February 2024, I granted the Applicant leave to enforce the Final Award.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT