Arbitration - British Virgin Islands

The BVI Commercial Court – interfacing with arbitration

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Recent decisions in the BVI Commercial Court have shaped the applicability and enforcement of arbitration clauses and, notably, how they interface with BVI statutory remedies and liquidations.

Standing to arbitrate?

In *Comodo Holdings Ltd*(1) the BVI Commercial Court clarified the need for the arbitration agreement to be 'subsisting' as between the parties before the court, and that the court (rather than arbitration) is the appropriate forum for determining whether parties have standing to arbitrate.

In this case it was argued that the applicant defendants' application for a stay in favour of arbitration in New York should be refused because the defendants were not members of the respondent company for the purposes of the articles of association and/or the BVI Business Companies Act 2004. It was successfully argued that the corollary of their inability to demonstrate membership was an absence of standing to invoke an arbitration clause in the company's articles of association. The defendants sought to rely on the evidence of share certificates issued in 2000 and 2001, to support the contention that they were existing members of the company. However, they were able to demonstrate neither that they had given consideration for the shares nor that they had been entered on the share register. To assert that title to shares constituted membership of a company, either under the old International Business Companies Act 1984 or the BVI Business Companies Act 2004, was to fundamentally misapprehend the policy of BVI companies legislation, which is premised on the English company law framework.

The court found that *prima facie* evidence of title is not the same as membership of a company, and that corporate membership can be evidenced only by entry on the share register. The Commercial Court's finding followed the recent English Supreme Court ruling in *Enviroco Ltd v Farstad Supply A/S*.(2) The court followed the clear judgment in *Enviroco*, where the Supreme Court found that ever since the Companies Clause Consolidation Act 1845, membership has been determined by entry in the register of members. The court went further and found that, as in England and Wales, the BVI companies legislation proceeds on that basis; the legislation would otherwise be unworkable and business efficacy requires it.

The court added in passing that arbitration proceedings were not and could not be an apt forum to decide the question of standing to arbitrate.

Arbitration clauses and unfair prejudice

In *Ennio Zanotti v Interlog Finance Corp*,(3) the court allowed the enforcement of an arbitration clause embedded in the company's articles of association and subsequently stayed unfair prejudice proceedings brought by a member under the BVI Business Companies Act. The unfair prejudice proceedings also contained allegations against parties that fell outside of the arbitration agreement.

Section 6 of the Arbitration Act provides for proceedings in breach of an arbitration agreement to be stayed unless the agreement is "[1] null and void, [2] inoperative or incapable of being performed or [3] that there is not in fact any dispute between the parties with regard to the matter agreed to be referred".

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The member relied on English case *Exeter Football Club Ltd v Football Conference Ltd* (4) and Australian case *A Best Floor Sanding Party v Skyer Australia Party Ltd*.(5) In *Exeter*, the court confirmed that the statutory right of a member to apply for relief under Section 459 of the UK Companies Act 1985 (the equivalent of Section 184I) could not be ousted by an agreement to arbitrate. In *Best Floor*, it was decided that contracting out of a winding-up process would be null and void as contrary to public policy (being a class remedy).

The court rejected the reasoning in *Exeter* and found that there is a difference between proceedings to appoint liquidators and Section 1841 proceedings, because while liquidation proceedings are compulsory in nature (and definitely cannot be ousted by contract), there is no public element in Section 1841 proceedings. Indeed, public policy in the British Virgin Islands should encourage a party's contractual right to arbitrate.

The English court subsequently followed suit in *Fulham Football Club (1987) Ltd v Richards*(6) and the positions of the two jurisdictions are now aligned.

However, care must be taken when drafting arbitration clauses, which – if a "messy and inconvenient" result is to be avoided – should look to embrace conflict between all members and the company.

Liquidations and arbitration

Arbitration and winding up partnerships

In *Artemis Trustees Limited as Trustee of the New Horizon Trust*, the BVI Commercial Court reinforced its position in *Zanotti* upholding the contractual right to settle disputes to arbitration agreements within a partnership agreement. In *Artemis* there was an application for the winding-up and dissolution of the first and second defendant partnerships. The defendants sought a stay in favour of arbitration pursuant to the arbitration agreement contained in the defendants' articles of limited partnership.

At first sight, the clause might appear to be void on the grounds of public policy:

> "*it is well established that an arbitrator cannot make an award winding up a limited company, it is the law here [citing Zanotti] and in England and Wales [citing Fulham Football Club] that he may grant relief in unfair prejudice proceedings*."

However, the court examined the policy's rationale and distinguished compulsory liquidation from both partnerships and members' voluntary winding-up:

> "*The long standing objection to arbitrators purporting to wind up limited companies is not based only…on the inability of a private individual to dissolve an entity which is entirely the creature of statute. It is based firmly in the inability of a private individual, acting as an arbitrator, to make awards binding persons other than the parties to the arbitration. An appointment of liquidators to a company within the meaning of the Insolvency Act, 2003 by the Court immediately affects the rights of third parties. I do not consider that making an award dissolving a limited partnership an arbitrator would be purporting to do any such thing. The dissolution of a partnership, general or limited, like members' voluntary winding up, leaves the rights of creditors and others unaffected. They remain free to pursue liable partners singly or collectively…In my judgment, a limited partnership has no identity separate from the identities of its constituent members*"

Ultimately, after finding no grounds for treating the arbitration agreement as being null and void, the BVI Commercial Court stayed the proceedings pursuant to Section 6(2) of the Arbitration Ordinance.

Tests for challenging enforcement

In *GL Asia Mauritius II Cayman Ltd*(7) the court refused an application to wind up Pinfold Overseas Limited on the basis of an arbitral award that fell outside of the scope of the arbitration agreement.

The case follows the decision in *Pacific China Holdings Ltd v Grand Pacific Holdings*,(8) where the Court of Appeal found that when there is a real question as to whether an award is enforceable under Part IX of the Arbitration Act 1976, an application to appoint liquidators based on that award must be refused.

Pinfold argued that award of costs to GL Asia in connection to proceedings brought in Goa did not fall within the scope of the arbitration agreement. The court agreed and found that:

> "*the court like parties, is stuck with the Tribunal's decisions, but not if the decision is about a matter which was not properly before it. It my judgment the court is not obliged to accept the Tribunal's defective reasoning if the result would be to treat as enforceable an award which the Tribunal clearly had no*

jurisdiction to make."

The court refused the winding-up application and concluded that:

> *"if a company raises a bona fide challenge to the validity or fairness of the arbitral award itself, falling short of proof on the balance of probabilities, it should no more be wound up on the basis of the resulting award than it should be on the basis of a claim in a debt which is substantially disputed, but not necessarily proved not to exist".*

A company defending winding-up proceedings need not show that the award is unenforceable, but rather that the award is sufficiently vulnerable to challenge of substance.

When application for a stay meets application for summary judgment

In *Applied Enterprises Limited v Interisle Holdings Ltd*(9) the claim concerned a demand for Interisle to surrender 2,500 of the 5,000 allotted shares as a result of its failure to pay the US$10.5 million unpaid balance for the share purchase. Applied Enterprises applied to the BVI court for the rectification of the share register to reflect its entitlement for the shares to be registered in its name following Interisle's alleged default. In short, Interisle relied upon an arbitration clause and applied for a stay.

Applied Enterprise countered with an application for summary judgment on the basis that Interisle had no real prospect of defending the claim and that there was no dispute capable of going to arbitration.

Interisle maintained that its obligation to pay the US$10.5/5.25 million was hindered by circumstances beyond its control (the general economic downturn resulting in difficulty in gaining financing). The court(10) found that the wide terms of the agreement's *force majeure* clause 18.2 showed that "it was far from obvious that it could not be understood as excluding inability to obtain credit particularly where… it was envisaged that the payment would be funded by means of the proposed Development Loan".

Ruling in favour of Interisle, the court found that summary judgment was not the proper context for resolving the issues that were fact sensitive; nor was the court convinced that there was no real prospect of defending the claim at trial. The court upheld the distinction in *Channel Tunnel* between a defendant who "is not really raising a dispute at all" and proper disputes.

Thus, "a dispute which a claimant is very likely to overcome" will still qualify as a dispute and give rise to something to arbitrate.

The court concluded that the appropriate approach for a court to consider when considering a stay in favour of arbitration that has been responded to by a summary judgment application is:

- whether the claim is within the scope of the arbitration agreement (as in *Comodo Holdings Ltd* and *GL Asia Mauritius* above); and
- whether the defendant disputes it.

If so jurisdiction and summary judgment should be declined and a stay granted in favour of arbitration, irrespective of the likely outcome of any summary judgment application.

Comment

Thematically, once standing is established, the BVI courts have taken a broad and pro-arbitration stance in relation to what matters are capable of being arbitrated. This has been driven by a general acceptance of arbitral tribunals to provide statutory remedies that have traditionally been the preserve of the courts and for the courts to find pragmatic ways in which to assist in their enforcement. Statutory unfair prejudice claims, the winding up of partnerships by arbitration and rectification of share registers (11) are primary examples.

Parties to arbitrations should, however, have one eye on the efficacy of future enforcement and be aware that blurred awards containing matters that may not properly have been subject of arbitration (eg, see *Grand Pacific*) may prove to frustrate the ability to enforce in the British Virgin Islands.

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Endnotes

(1) *Comodo Holdings Ltd v (1) Renaissance Ventures Ltd* BVIHC (Com) 2013/0045

(2) *Enviroco Ltd v Farstad Supply A/S* [2011] 2 BCLC 165

(3) *Ennio Zanotti v (1) Interlog Finance Corp* BVIHCV 2009/0394

(4) [2004] 1 WLR 2910

(5) [1999] VSC 170

(6) [2012] Ch 333

(7) BVIHC(COM) 2013/0055 p6 paragraph 14

(8) HCVAP 2010/007

(9) BVIHC(COM) 2012/0135

(10) BVIHC(COM) 2012/0135 p8 paragraph 20

(11) BVIHC(COM) 2013/0055 p4 paragraph 10