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The BVI Commercial Court – Interfacing with Arbitration

Key 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.

Harneys take a look at the recent case law and its impact on arbitration involving BVI companies.

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Standing to Arbitrate?

Recently, in, *Comodo Holdings Ltd*[i], 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 (not arbitration) is the appropriate forum for determining whether parties have locus to arbitrate.

In this case Harneys successfully argued that the Applicant defendants' application for a stay in favour of arbitration in New York must be refused, because the defendants were not members of the respondent company for the purposes of the Articles 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 *locus standi* 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 neither able to demonstrate 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 that 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 only be evidenced 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*[ii] relied on by Harneys. The Court followed Lord Collins' 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 & Wales, the BVI companies legislation proceeds on that basis; the legislation would otherwise be unworkable and business efficacy requires it.

The Court added by way of *obiter dicta* that arbitration proceedings were not and could not be an apt forum to decide the question of *locus standi* to arbitrate.

Arbitration clauses and unfair prejudice

In *Ennio Zanotti v Interlog Finance Corp & Others*[iii], Harneys successfully argued for the enforcement of an arbitration clause embedded in the company's articles of association and the Court subsequently stayed unfair prejudice proceedings brought by a member under the BVI Business Companies Act. The unfair prejudice proceedings also contained allegations against parties who 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 one of the exceptions applies; 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 … ".

The member relied on English case *Exeter Football Club Ltd v Football Conference Ltd*[iv] and an Australian case *A Best Floor Sanding Party v Skyer Australia Party Ltd*[v]. In Exeter, the Court confirmed the statutory right of a member to apply for relief under s459 of the UK Companies Act 1985 (the equivalent of s184I) 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 was a difference in principle between proceedings to appoint liquidators and s.1841 proceedings, because whilst liquidation proceedings were compulsory in nature (and definitely could not be ousted by contract) there was no public element in s.1841 proceedings. Indeed public policy in the BVI should encourage a parties' contractual right to arbitrate.

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

Care however 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 & Others*, the BVI Commercial Court reinforced its position in Zanotti upholding the contractual right to settle disputes to arbitration agreements within 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 blush, it might appear to be a void clause on the ground 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 s.6(2) of the Arbitration Ordinance.

Tests for challenging enforcement

In *GL Asia Mauritius II Cayman Ltd*[vii] Bannister J 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*[viii] 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. Bannister J 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.

Bannister J in refused the winding up application 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 an application for a stay meets an application for summary judgment

Applied Enterprises Limited –v- Interisle Holdings Ltd[ix]

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 on the basis 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[x] found that the wide terms of 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 facts 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, in short, *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.

In the end 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:-

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

If it is and if he does [dispute the claim that is], then 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.

Commentary

Thematically, once *locus standi* is established the BVI Courts have taken a broad and pro-arbitration stance in relation to what matters are capable of being arbitrated. Importantly, 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[xi] being high light 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 (see for example *Grand Pacific*) may prove to frustrate the ability to enforce in the BVI.

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[i] *Comodo Holdings Ltd v (1) Renaissance Ventures Ltd; and (2) Joseph Katz (executor for the estate of Eric D Emanuel Dec'd) BVIHC (Com) 2013/0045*

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

[iii] Ennio Zanotti v (1) Interlog Finance Corp. (2) Enzo Zanotti (3) Nautilus Fiduciary Services Limited (a Jersey Company) BVIHCV 2009/0394

[iv] [2004] 1 WLR 2910

[v] [1999] VSC 170

[vi] [2012] Ch. 333

[vii] BVIHC(COM) 2013/0055 p.6 par 14

[viii] HCVAP 2010/007

[ix] BVIHC(COM) 2012/0135

[x] BVIHC(COM) 2012/0135 p.8 par 20

[xi] BVIHC(COM) 2013/0055 p.4 par 10

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