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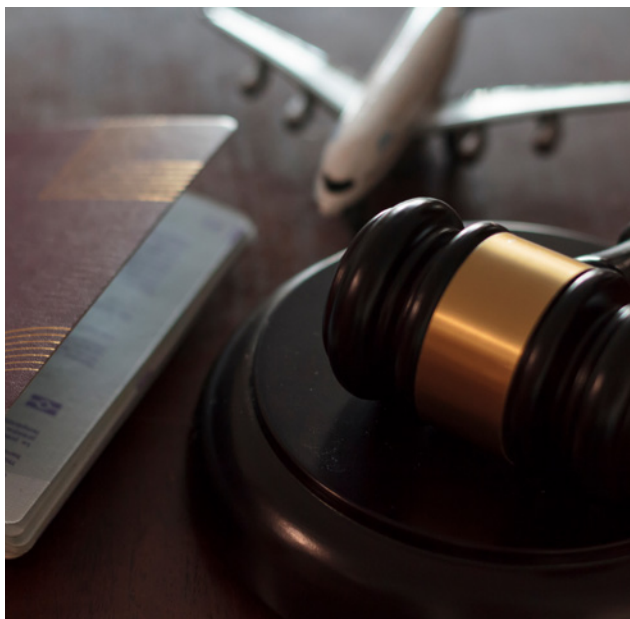
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Enforcement of Foreign Judgments and Arbitral Awards from Asia in Offshore Jurisdictions

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This article commences with an overview of the statutory and common law regimes allowing the enforcement of judgments and arbitral awards in the British Virgin Islands, Bermuda and the Cayman Islands. It then discusses the specific options available to Asia Pacific parties who wish to implement an enforcement strategy involving assets in those offshore jurisdictions, particularly where those assets are shares in companies incorporated there. Key considerations include the strategic merits of those options.

Introduction

However strong the claim, and however certain the likelihood of obtaining a favourable judgment or award, no litigation strategy is ultimately successful if it does not extend to enforcement and recovery.

It is common for Hong Kong and Mainland Chinese businesses and individuals, lenders, investors and other

counterparties (as well as businesses and individuals from other jurisdictions in the Asia Pacific region), to include within the documents governing their relationships a term conferring jurisdiction on the Hong Kong courts or an arbitration agreement specifying Hong Kong-seated arbitration. Given that many Hong Kong and Mainland Chinese businesses and individuals use companies incorporated in the British Virgin Islands (BVI), Bermuda

and the Cayman Islands (referred to collectively as ‘offshore jurisdictions’ in this article) as holding and investment vehicles, persons doing business with them need reassurance that, should things go wrong and a dispute arise, any award or judgment that they may secure will be readily enforceable against assets in those jurisdictions.

“However strong the claim, and however certain the likelihood of obtaining a favourable judgment or award, no litigation strategy is ultimately successful if it does not extend to enforcement and recovery.”

In practice, the BVI, Bermuda and Cayman courts frequently deal with enforcement proceedings brought by persons seeking to enforce judgments or awards issued by courts or arbitral tribunals within the Asia Pacific region against or in respect of assets held in the relevant offshore jurisdiction, commonly shares in companies incorporated within that jurisdiction. All three jurisdictions have well-developed procedures to enable such enforcement.

Foreign judgments

Enforcement

The statutory regimes for enforcement of judgments (collectively, the Reciprocal Enforcement Acts) in each of the offshore jurisdictions under discussion extend only to the following Asia Pacific jurisdictions:

- (1) in the BVI, the Reciprocal Enforcement of Judgments Act 1922 extends to judgments from (*inter alia*) New South Wales (Australia);
- (2) in Bermuda, the Judgments (Reciprocal Enforcement)

- Act 1958 is applicable to final monetary judgments from (*inter alia*) Hong Kong. The statutory regime was further extended by the Judgments (Reciprocal Enforcement) (Australia) Order 1988 to include judgments from the various Australian states and territories;
- (3) in the Cayman Islands, the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) extends only to judgments from Australia and its external territories.

Other jurisdictions in the Asia Pacific region are excluded from the statutory scheme. Judgments from those jurisdictions covered by the Reciprocal Enforcement Acts can be registered in the relevant offshore jurisdiction following a simplified application procedure. Following registration, the foreign judgment may be enforced in the same manner as any domestic judgment made by the court of that offshore jurisdiction.

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None of the three offshore jurisdictions featured are parties to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 2019. Parties seeking to enforce judgments from Asia Pacific jurisdictions excluded from the statutory schemes in the BVI, Bermuda and the Cayman Islands will therefore have to rely on the common law regime for enforcement in these jurisdictions. While a detailed exposition of the procedural rules for initiating enforcement proceedings under the common law is beyond the scope of this article, suffice to say that fresh proceedings suing on the judgment debt must be commenced in the relevant offshore jurisdiction(s) and served on the judgment debtor. If the judgment debtor does not enter an appearance (including by acknowledging service or filing a defence), the judgment creditor can apply for judgment in default of appearance. If the judgment debtor does enter an appearance, the judgment creditor will usually apply for summary judgment. Again, once judgment is entered, it is enforceable as a domestic judgment in the relevant offshore jurisdiction(s).

Enforcement of foreign non-money judgments

The traditional common law position¹ is that only money judgments are enforceable at common law and that non-money judgments are not enforceable. However, if a party has a foreign non-money judgment based on a cause of action recognised by BVI, Bermuda or Cayman Islands law (as applicable) and from proceedings between identical parties with identical issues, it may also be possible to rely on a cause of action estoppel (*res judicata*), or on an issue estoppel. These would prevent the defendant from denying any matter of fact or law determined by the foreign court, allowing the plaintiff to obtain summary judgment in the relevant jurisdiction(s) on the basis that it would be an abuse of process for the claim to be relitigated.²

The position in the Cayman Islands has arguably diverged from the traditional common law position. In *Bandone Sdn Bhd v Sol Properties Inc (Bandone)*, Henderson J, sitting in the Grand Court (the Cayman Islands' court of first instance), held that Cayman law would permit enforcement of non-money judgments, citing (1) policy reasons summarised by the Supreme Court of Canada in *Pro Swing Inc v Elta Golf Inc*³ and (2) the Privy Council decision in *Pattni v Ali*.⁴ However, this is a developing area of law and any future case seeking to rely upon *Bandone* as authority for the principle that non-money judgments are enforceable may well be challenged.⁵

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Challenges to enforcement of a foreign judgment

Opposition to enforcement at common law typically takes the form of substantive defences raised in the fresh proceedings. Grounds for challenges may include allegations that:

- (1) the courts of the foreign country did not have jurisdiction to give the judgment in the view of law applicable in the jurisdiction in which enforcement is sought;
- (2) the foreign judgment was obtained by fraud or was the product of collusion;
- (3) enforcement would be contrary to the public policy of the offshore jurisdiction in which enforcement is sought and/or;
- (4) the foreign judgment was obtained in proceedings contrary to natural justice.⁶

Although there are some differences as to how the grounds for challenge under the Reciprocal Enforcement Acts are articulated, they are in substance the same as at common law.⁷

Unless the judgment can be impeached on one of the grounds above, the BVI, Bermuda or Cayman Islands court asked to enforce the judgment will not look behind it and may give summary judgment, reflecting the foreign judgment, without the necessity of a trial.

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Arbitral awards

Enforcement

The BVI, Bermuda and the Cayman Islands are pro-

arbitration jurisdictions which have modern arbitration statutes broadly modelled on the UNCITRAL Model Law on International Commercial Arbitration:

- (1) in the BVI, the Arbitration Act 2013 (the BVI Arbitration Act);
- (2) in Bermuda, the International Conciliation and Arbitration Act 1993 (the Bermuda International Arbitration Act); and
- (3) in the Cayman Islands, the Arbitration Law 2012 (the Cayman Islands Arbitration Law).

“Bermuda, the BVI and the Cayman Islands are pro-arbitration jurisdictions which have modern arbitration statutes broadly modelled on the UNCITRAL Model Law ... [They are] all parties to the New York Convention.”

The BVI, Bermuda and the Cayman Islands are all parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). The courts of each of these offshore jurisdictions have statutory jurisdiction to grant interim measures in relation to any arbitral proceedings seated outside the relevant offshore jurisdiction, including orders preserving assets pending enforcement.⁸

In the Cayman Islands, the Grand Court recently published a judgment recording for the first time a decision to grant leave to enforce an interim award made in the course of a foreign-seated arbitration. Although the application was heard *ex parte* and so may be subject to challenge, the ruling indicates that a litigant in possession of an interim award may not have to apply for free-standing interim relief from the Cayman

courts to obtain interim relief in support of foreign-seated arbitration proceedings.⁹

“The grounds for refusing enforcement of a Convention award under art V of the New York Convention are applicable in the BVI, Bermuda and the Cayman Islands.”

A detailed exposition of the enforcement procedures in these offshore jurisdictions is beyond the scope of this article. They may be summarised as follows.

- (1) In the BVI, enforcement of foreign arbitral awards is most commonly initiated on an *ex parte* basis under the Eastern Caribbean Civil Procedure Rules (EC CPR) (with or without notice). Once the award is registered, it can be enforced as if it were a BVI court judgment. If leave to enforce is granted, the order must be served on the other party, who may apply to appeal and set aside that decision within the time period directed by the court.
- (2) In Bermuda, the enforcing party may apply for leave to enforce a foreign award on an *ex parte* basis (with or without notice). If the court directs a summons to be issued, it will be an originating summons. On an *ex parte* application where leave has been granted to enforce the award (as in the Cayman Islands: see below), the respondent then has 14 days (or if the order is to be served out of the jurisdiction, such period as the Court may fix in the order) to apply to set aside the order or challenge enforcement.
- (3) In the Cayman Islands, the enforcing party can apply to the Grand Court (Financial Services Division) for leave to enforce a foreign award by *ex parte* originating summons

(with or without notice), pursuant to the Grand Court Rules (2013 Rev) (GCR). Where an *ex parte* enforcement order is granted by the Grand Court, it must be served on the respondent, which then has 14 days (or, if the order is to be served out of the jurisdiction, such period as the Grand Court may fix in the order) to apply to set aside the order or to challenge enforcement.

Challenging enforcement of an arbitral award

The grounds for refusing enforcement of a Convention award under art V of the New York Convention are applicable in the BVI, Bermuda and the Cayman Islands.¹⁰

In relation to non-New York Convention awards, the BVI, Bermuda and Cayman Islands courts take the same approach to public policy as if they were considering the enforcement of a foreign court judgment.

Strategies for enforcing foreign judgments and arbitral awards

Once a foreign judgment or an award has been recognised, or a judgment given by a court in the BVI, Bermuda or the Cayman Islands giving leave to enforce, it can be enforced in the same manner as a domestic judgment or order of the local offshore court.

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A number of options are potentially available by way of enforcement. These include:

- (1) writs of *feri facias* (the seizure and sale of the judgment debtor's goods and chattels sufficient to satisfy the debt and costs of the execution);
- (2) garnishee proceedings (where a person indebted to the judgment debtor is required to pay moneys owed directly to the judgment creditor);
- (3) charging orders (note that, in contrast to the BVI and the Cayman Islands, charging orders are not available in Bermuda);
- (4) the appointment of receivers; and
- (5) attachment of earnings orders, whereby a judgment debtor's salary is paid directly to the judgment creditor (this is only available expressly as a statutory jurisdiction in the Cayman Islands).

Charging and sale or receivership orders

A common method of enforcement against shares in the BVI and the Cayman Islands is as follows:

- (1) the enforcing party can apply for a charging order, providing the judgment creditor with security over the judgment debtor's assets (including shares in a company), effectively making the judgment creditor a secured creditor;
- (2) the judgment creditor can then enforce the judgment by obtaining an order for sale of the charged property or to appoint a receiver over the charged assets who can then proceed to realise their value (as further explained below); and
- (3) the debt can then be satisfied out of the proceeds of sale.

Charging Orders

In both the BVI and the Cayman Islands, an application is made, in the first instance, for an order *nisi* (or a provisional charging order). It is made on an *ex parte* basis. Once an order *nisi* is made and served on the debtor, the BVI or Cayman court will consider at a further *inter partes* hearing whether to

make the provisional order final. A judgment creditor in the BVI must wait six months before seeking a final order that can then be enforced.¹¹

The question whether a charging order *nisi* should be made absolute is one for the discretion of the court. The BVI and Cayman courts should exercise their discretion so as to do equity, so far as possible, to the parties involved: that is to say, the judgment creditor and debtor, and all other unsecured creditors. However, the burden of showing cause why a charging order *nisi* should not be made absolute is on the judgment debtor.¹²

Sale Orders

Following the making of a final charging order in the BVI and the Cayman Islands, if the judgment debtor fails to satisfy the judgment debt, the judgment creditor may then apply to the relevant court for an order for the sale of the charged assets.

“Once [a charging] order *nisi* is made and served on the debtor, the BVI or Cayman court will consider at a further *inter partes* hearing whether to make the provisional order final. ... The question whether a charging order *nisi* should be made absolute is one for the discretion of the court.”

This remedy is equitable and it is therefore within the discretion of the court whether or not to grant it. A balance has to be struck between a debtor being deprived of its property and a creditor being deprived of its remedy. The judgment creditor must demonstrate that, in the absence of an order for sale of the shares, nothing will be done by the judgment

debtor toward paying the judgment debt. This may be shown where the defendant (1) has failed to participate in the enforcement proceedings at all, or (2) has not participated in those proceedings until the very last minute and then offers only a modest and limited response.¹³

“ [The] remedy [of Sale Orders] is equitable and it is therefore within the discretion of the court whether or not to grant it. A balance has to be struck between a debtor being deprived of its property and a creditor being deprived of its remedy. ”

The BVI and Cayman courts may give such directions as seem appropriate to secure the expeditious sale of the stock or property charged at a price that is fair to both the creditor and judgment debtor:

- (1) the court may make brief and conclusive orders for direct sale of shares without giving further directions; or
- (2) alternatively, the court may give further directions for a sale process. In a recent Grand Court judgment dated 3 August 2021 in *Top Jet Enterprises Ltd v Sino Jet Holding Ltd & Ors (Top Jet)*,¹⁴ Segal CJ made detailed directions for a sale process conducted by independent accountants following the making of a final charging order in connection with the enforcement of a foreign arbitral award.

The BVI or Cayman court may be prepared to give directions for the sale of shares held by the judgment debtor on the open market (either by auction or tender), with a provision allowing the judgment creditor to bid or tender for the shares.

If successful in its bid or tender for sale, the judgment creditor can then offset part of its judgment debt against the market price of the charged shares (so that it would not need to part with any cash at all). In the aforementioned *Top Jet* decision, the judgment debtor was in principle permitted to credit bid for the shares. If, however, the judgment creditor does credit bid and there are no other bids (or no other independent and substantial bids), then those conducting the sale would be required to obtain an independent valuation of the shares which would be taken into account when deciding whether to accept the credit bid and at what price.

Receivers

A judgment may also be enforced by applying for the appointment of a receiver by way of equitable execution. The appointment of a receiver is made by way of an order from the court against the judgment debtor in respect of the charged assets. The court may grant such an application where it would be “just and convenient” to do so.

The circumstances in which a receiver may be appointed include where there are charging orders over all the issued shares of a BVI or Cayman company and an enforcing party wishes to take steps to realise the assets of the company whose shares are charged.

A receiver appointed over a sufficient proportion of the issued share capital of a company can vote the shares to appoint new directors to the company’s board. The reconstituted board can then proceed to sell the company’s assets down the chain in order to satisfy a judgment debt. This strategy has been deployed successfully in the BVI in a case in which a judgment from a court in Mainland China was successfully recognised and enforced.¹⁵ The strategy also appears to be theoretically possible in the Cayman Islands. Where possible, this strategy is preferable to an order for sale of shares in circumstances where such a sale would result in a discounted recovery, prejudicing both the judgment creditor and the judgment debtor because the value of the underlying assets is unknown or the shares are otherwise illiquid.

In Bermuda, where there is no jurisdiction to make a charging order in respect of a judgment debtor's assets, if a judgment creditor determines that direct enforcement against the debtor's assets would be difficult, it may apply for the court to appoint a receiver to assist with gathering in the debtor's assets.

Conclusion

As disputes concerning offshore parties and assets continue to be a common feature of Asia Pacific-seated commercial litigation and arbitrations in Asia Pacific jurisdictions, there will continue to be a need to consider enforcement strategies in offshore jurisdictions as a crucial step following the handing down of foreign judgments and awards.

As this article demonstrates, there are a number of strategies that can be adopted to enforce judgments and arbitral awards in the BVI, Bermuda and the Cayman Islands and to challenge their enforcement. All three jurisdictions have sophisticated judiciaries that will assist judgment and award creditors in appropriate circumstances. ■■

- 1 Set out in Rule 46 of *Dicey, Morris & Collins on the Conflict of Laws* (16th Edn, 2022).
- 2 *Ibid*, 14-036 to 14-040 (issue estoppel); see also 14-044 ff (*res judicata*).
- 3 2006 SCC 52. In that case, the Supreme Court of Canada held, contrary to the predecessor rule to Rule 46, that the Canadian courts could enforce non-money judgments on a discretionary basis provided that the enforcing court considered relevant factors to ensure that enforcement would not be contrary to the "structure and integrity of the Canadian legal system" (at [17], per Deschamps J). *Editorial note*: The rule current at the time of the judgment was Rule 35 in *Dicey & Morris on the Conflict of Laws* (13th Edn, 2000).
- 4 In *Pattni v Ali* [2007] AC 285, the Privy Council held that: "where a court in state A makes, as against persons who have submitted to its jurisdiction, an in personam judgment regarding contractual rights to either movables or intangible property (whether in the form of a simple chose in action or shares) situate in state B, the courts of state B can and should recognize the foreign court's in personam determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B. The extent to which this was possible might be limited by the law of state B as the situs or, in the case of shares, as the place of incorporation of the relevant company (in this case, as both)." (Emphasis as provided by Henderson J in *Bandone* in italics, with author's further emphasis thereto underlined.) Henderson J concluded that: "The emphasized words in the quotation from *Pattni v Ali*, set out above, appear to alter the traditional rule that a foreign judgment in personam can be enforced directly in England (and, by extension, in

- the Cayman Islands) only if it is for a debt, or definite sum of money."
- 5 See Graeme Halkerston, *Enforcement of foreign non-money judgments at common law in offshore jurisdictions: back to basics* (2015) 21(9) *Trusts and Trustees* 969-980.
 - 6 Dicey, Morris & Collins, *op cit* (note 1), Rules 52-55.
 - 7 (1) For Bermuda: see s 4 of the Judgments (Reciprocal Enforcement) Act 1958; (2) for the BVI: see s 6(1)(a) of the Reciprocal Enforcement of Judgments Act 1922; (3) for the Cayman Islands, see s 6(1)(a) of the Foreign Judgments Reciprocal Enforcement Law (1996 Rev).
 - 8 (1) For the BVI: see s 43(2) (Court-ordered Interim Measures) of the BVI Arbitration Act 2013. The powers conferred by this section may be exercised by the Court irrespective of whether or not similar powers may be exercised by an arbitral tribunal under s 33 in relation to the same dispute; (2) for Bermuda: see s 35(5) of the Bermuda International Conciliation and Arbitration Act 1993, which incorporates art 9 of the UNCITRAL Model Law on International Commercial Arbitration; (3) for the Cayman Islands: see s 54(1) of the Cayman Islands Arbitration Law 2012. The Grand Court also has the same power as a tribunal to issue interim measures, pursuant to s 44 of the 2012 Law, and irrespective of whether the seat of the arbitration is in the Cayman Islands, as it has in relation to court proceedings.
 - 9 *Nasser Sulaiman HM Al Haidar v Jetty Venkata Uma Maheshwara Rao* (FSD 328 of 2022, IKJ), unreported (judgment of Kawaley J dated 3 February 2023); see Colette Wilkins KC, Nick Dunne & John Crook, *Grand Court grants leave to enforce a foreign interim arbitration award* (Walkers Advisory, February 2023), available at <https://www.walkersglobal.com/index.php/publications/99-advisory/3366-grand-court-grants-leave-to-enforce-a-foreign-interim-arbitration-award>.
 - 10 Enshrined in, respectively, s 83 of the BVI Arbitration Act 2013, s 42 of the Bermuda International Conciliation and Arbitration Act 1993 and s 7 of the Cayman Islands Foreign Arbitral Awards Enforcement Law (1997 Rev).
 - 11 *JTrust Asia Pte Ltd v Mitsuji Konoshita*, BVIHCM 2020/0167 (Wallbank J, 1 November 2021).
 - 12 *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liq)* [1983] 1 All ER 564 (House of Lords).
 - 13 *Top Jet Enterprises Ltd v Sino Jet Holding Ltd & Ors* (unreported, Grand Court (FSD), judgment dated 3 August 2021), per Segal CJ at [18]. See also *Amari Lifestyle Ltd (t/a Amari Super Cars) v Warnes* [2017] EWHC 1891 (Ch), per Stephen Jourdan KC, sitting as a deputy judge, at [61]: "... An order for sale is the ultimate sanction for which powerful reasons are required, and which should be seen as extreme order which should be resorted to only in extreme cases, particularly where the property to be sold is the debtor's home. ... However, although it is a draconian step to satisfy a simple debt, it may be justified in the case where in reality without a sale the judgment debt would not be paid."
 - 14 Note 13 above.
 - 15 *Industrial Bank Financial Leasing Co Ltd v Xing Libin*, BVIHC (COM) 0032 of 2018 (28 January 2020, unreported, Jack J) (Eastern Caribbean Supreme Court). See Iain Tucker *et al*, *The BVI Courts appoint a receiver to take control of a PRC judgment debtor's assets* (Walkers Advisory, 11 February 2020), available at <https://www.walkersglobal.com/index.php/publications/99-advisory/1859-the-bvi-courts-appoint-a-receiver-to-take-control-of-a-prc-judgment-debtor-s-assets>.