

## Snapshot: Grand Court gives comprehensive guidance for enforcement of foreign arbitral awards in the Cayman Islands

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The Cayman Islands benefits from a statutory "self-contained procedural code" for the recognition and enforcement of foreign arbitral awards made in countries which are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York, 10 June 1958, the New York Convention*). This 'code' is set out in the statute which governs the regime, being the *Foreign Arbitral Awards Enforcement Act (1997 Revision) (FAAEA)*.

Considered below are the statutory principles and practical considerations which must be taken into account when enforcing a foreign arbitral award under the FAAEA as reiterated in the recent judgment of the Grand Court of the Cayman Islands (the Grand Court) 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 (unreported, 8 March 2024, Kawaley J) (Swiss Chambers)*.

### Statutory principles and practical considerations

Although the principles which underpin an application under the FAAEA are well known, *Swiss Chambers* is a helpful decision in that it provides a comprehensive summary of the governing legal and procedural requirements for enforcement of foreign arbitral awards made under the *New York Convention*, pursuant to section 5 FAAEA. In doing so, Kawaley J stated that: "The key elements of the statutory procedural scheme can be summarised as follows:

- applications to enforce awards under, *inter alia*, section 5 of the Act may be made and granted on an *ex parte* basis;
- 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;

- 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);
- the affidavit must state the last known address of the respondent;
- the affidavit must explain the extent to which, if any, the award has been complied with;
- 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);
- the order must state the time fixed for applying to set it aside; and
- the relevant address to be described for companies is the registered or principal office."

From this useful summary, there are a few important points to note, which follow.

## Presumption in favour of enforcement

The Cayman Islands enforcement regime is one which provides for a clear presumption in favour of recognition and enforcement of foreign awards, including those awards made pursuant to arbitrations determined under the New York Convention. This presumption has been recognised in various decisions of the Cayman Islands Court, including in the Swiss Chambers decision where Kawaley J confirmed that "there is a clear presumption in favour of enforcement".

This presumption comes from the wording of opening words of *section 7 FAAEA* which provides "[e]nforcement of a [New York Convention] award shall not be refused" except on very narrow grounds. These grounds are set out in section 7(2) and (3) FAAEA and mirror those provided for by Article V of the New York Convention. As noted in Swiss Chambers, an enforcement application may only therefore be refused if the respondent can 'prove' one of the following:

- "(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."

In Swiss Chambers, relying upon his earlier decision in *Al Haidar v Rao*, Kawaley J confirmed that: "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".

## **Additional obligations on an *ex parte* application**

As noted above, the Grand Court is permitted to deal with applications under FAAEA on an *ex parte* basis. Indeed, this is usually the case. However, in those circumstances, in addition to the matters set out in the summary above, an applicant will have further obligations when making such an application.

These additional obligations are common law requirements upon all applicants when appearing before the Grand Court on an *ex parte* application and provide that such an applicant has the duty to present each application fairly and to make full and frank disclosure of all material matters to the Court, including information that may be adverse to the applicant. This duty is one which must be taken seriously and may result in a discharge of the *ex parte* order if it is subsequently found that the applicant did not satisfy them.

However, given the pro-enforcement approach inherent in the enforcement regime, this duty is usually easier to discharge in the context of application under the FAAEA. In Swiss Chambers, Kawaley J confirmed this on the basis that:

"(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."

The Court also confirmed that in the majority of cases, the duty of fair presentation can 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."

## Service and enforcement

Kawaley J also provided helpful guidance that, once leave has been granted to enforce an order against a respondent outside of the jurisdiction of the Cayman Islands, care should be taken to ensure that the foreign respondent has an appropriate period of time, following service of the order, within which to apply to set it aside before the Award may be enforced.

In most cases involving an overseas respondent, the starting point is that an extension to the usual time of 14 days (which applies to respondents within the jurisdiction) should be given. How long that extension will be is fact sensitive.

## Conclusion

While the recent decision in Swiss Chambers does not change the underlying procedural or legal requirements for enforcement of foreign convention awards under FAAEA, it is welcome in that it provides a useful summary of the statutory and practical considerations when seeking such relief.

## How can Ogier help?

The Ogier Dispute Resolution team in Cayman has strong experience in successfully applying to enforce convention awards under the statutory regime and would be happy to assist or provide further guidance. Please contact any of the key contacts listed below for further assistance.

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