

# A Guide to the Enforcement of Foreign Arbitral Awards in the Cayman Islands and the British Virgin Islands

The success and popularity of international arbitration as a means by which to resolve cross-border disputes is attributable in large part to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”), which underpins international arbitration by providing for the ready enforcement of foreign arbitral awards in contracting states (of which there are currently 161). In essence, the New York Convention requires contracting states to recognise [arbitration](#) agreements and to enforce arbitral awards (*i.e.* a written determination on the merits by the arbitral tribunal) made in other contracting states as though they are a domestic Court judgment of the contracting state. In practice, this means it is often considerably easier to enforce a foreign arbitral award than a foreign court judgment, the practical consequences of which may be significant.<sup>[1]</sup>

The New York Convention was extended by the UK Government to the Cayman Islands in 1980 and to the British Virgin Islands (“**BVI**”) in 2014, promoting the use of arbitration in both jurisdictions and facilitating the enforcement of foreign arbitral awards. Both jurisdictions have embraced international arbitration as a modern, efficient, cost-effective alternative to litigation and routinely enforce foreign arbitral awards.

This article provides a general overview of the procedure for the enforcement of foreign arbitral awards in each of the two jurisdictions.

## Cayman Islands

In the Cayman Islands, the rules applicable to the enforcement of foreign arbitral awards are governed by the Arbitration Law (2012 Revision) (the “**Arbitration Law**”) and the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the “**Enforcement Law**”). These statutes give domestic effect to the New York Convention. The Arbitration Law is based on the widely-adopted UNCITRAL Model Law on International Commercial Arbitration.

Section 72 of the Arbitration Law provides that an arbitral award made pursuant to an arbitration agreement may, with the leave of the Cayman Court, be enforced in the same manner as a judgment or order of the Court to the same effect. Upon the grant of leave, judgment may be entered in terms of the award.

Section 72(5) provides that an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application to the Court, shall be enforced subject (whether or not it is an award made in a New York Convention contracting state, *i.e.* a “**Convention award**”) to the provisions of sections 6 and 7 of the Enforcement Law.

An application for leave to enforce an arbitral award is made by *ex parte* originating summons, supported by affidavit evidence. In practice, the supporting affidavit is typically brief. Section 6 of the Enforcement Law provides that a party seeking to enforce a Convention award shall produce (and exhibit to the affidavit in support):

- (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.

In addition, the supporting affidavit needs to:

- (a) state the name and usual last place of abode or business of the applicant and the person against whom it is sought to enforce the award respectively; and
- (b) 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.

Once leave is granted, the order giving leave must be served on the debtor, who then has 14 days from service of the order (or if the order is to be served out of the jurisdiction, within such period as the Court may think fit) within which to apply to set it aside. The award shall not be enforced until either that 14 day time period has expired, or the Court has disposed of any application made within that period.

The grounds on which enforcement of a foreign arbitral award can be resisted are famously narrow and are set out in section 7 of the Enforcement Law (which mirror those in Article 5 of the New York Convention). To succeed, the person against whom enforcement is sought must prove that:

- (a) a party to the arbitration agreement was under some incapacity;
- (b) 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) he was not given proper notice of the appointment of the arbitrator or the arbitration proceedings, or was otherwise unable to present his case;
- (d) 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) 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;
- (f) the making of the award was induced or affected by fraud, corruption or misconduct on the part of an arbitrator; or
- (g) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

Enforcement 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. Whilst rare, the Cayman Court recently refused enforcement on public policy grounds. In *VRG Linhas Aereas S.A. v Matlin Patterson Global Opportunities Partners (Cayman) II L.P. & Ors*,<sup>[2]</sup> the Court exercised its limited discretion to refuse

enforcement of a Convention award in circumstances where, among other things, the defendants were not parties to the arbitration agreement and did not consent to arbitration. The Court held that the award violated the principles established by the New York Convention and was contrary to the public policy of the Cayman Islands.

Enforcement of an award shall not be refused except in the circumstances set out above. Accordingly, absent one of these grounds being established, the Court is bound to enforce the award and does so as a matter of routine.

## British Virgin Islands

The enforcement of foreign arbitral awards in the BVI is governed by the Arbitration Act, 2013 (the “**BVI Arbitration Act**”), which provides a modern statutory framework incorporating the UNCITRAL Model Law and New York Convention into domestic legislation, subject to statutory modifications.

Part X of the BVI Arbitration Act deals with the recognition and enforcement of arbitral awards. There is a distinction in the BVI Arbitration Act between a Convention award and a non-Convention award (*i.e.* an award not made in a Convention contracting state). However, any arbitral award can *prima facie* be enforced, provided there is no outstanding challenge to the arbitration.

### Convention awards

Convention awards can be enforced in the BVI either by:

- (a) commencing an action in the BVI High Court suing on the arbitral award; or
- (b) filing an Originating Application in the BVI High Court and applying for leave to enforce the award. The application may be made to the Court on an *ex parte* basis at which point there must be filed with the Court:
  - i. the authenticated original award or a certified copy of the original award;
  - ii. the original arbitration agreement or a duly certified copy of the arbitration agreement; and
  - iii. if the award or agreement is in a language other than the English language, a translation of the award or agreement, as the case may be, certified by an official or sworn translator or by a diplomatic or consular agent.

Prior to any enforcement action being taken pursuant to the Court order, the order will have to be served on the party against whom enforcement is sought. There will be different steps required depending upon whether service needs to be effected inside or outside the jurisdiction.

The Court may only refuse to enforce a Convention award on specific grounds as set out in the BVI Arbitration Act which are similar (but not identical) to those in the Cayman Islands, namely: (a) incapacity of a party; (b) invalidity of the arbitration agreement; (c) lack of proper notice of the arbitration or appointment of the arbitrator, or where a party was unable to present their case; (d) the arbitration was not in accordance with the agreement of the parties or the law of the relevant country; or (e) where the award is not yet binding on the parties, or it has been set aside or suspended in the jurisdiction in which it was made. Enforcement may also be refused if the Court finds that the subject matter of the award is not capable of settlement by arbitration under

BVI law or if the award contravenes the public policy of the BVI. The burden of proof is on the party against whom the award has been made to prove that one of the aforementioned circumstances applies. The scope for challenging a Convention award is much narrower than is available to the Court dealing with an application to enforce a non-Convention award. Indeed, there is no scope to refuse to enforce a Convention award outside of the specified grounds.

### Non-Convention awards

When seeking to enforce a non-Convention award, a party does not have the option, unlike when seeking to enforce Convention awards, to commence an action in the BVI High Court suing on the award.

To enforce a non-Convention award, a party must apply for leave to enforce the award. A party shall, again, be required to produce the documents referred to in (b)(i)-(iii) above concerning Convention awards.

The enacted provisions that apply to Convention awards, as outlined above, also apply to non-Convention awards. However, the Court is also able to refuse to enforce a non-Convention award if it determines that it would be “*just to do so*”. This is a wide ground for refusal not available in relation to Convention awards.

Whilst the BVI Arbitration Act outlines the law regarding enforcement, the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (as amended) govern the procedural requirements to facilitate enforcement, which apply to the enforcement of both Convention and non-Convention arbitral awards.

Parties seeking to enforce awards, whether or not made in a Convention contracting state, should be mindful of service requirements.

### Defences to enforcement

In addition to the specific grounds upon which the Court may refuse to enforce an arbitral award (referred to above), a party seeking to resist the enforcement of an award may deploy additional strategies. There is provision under the BVI Arbitration Act to set aside Convention and non-Convention awards. A party may, by way of application to a “*competent authority*” in the jurisdiction in which the award was made apply for the award to be set aside. In the event of such an application, the BVI Court may adjourn enforcement proceedings and may, on application, order the party against whom enforcement is invoked to give security. A decision to adjourn or order the provision of security is not appealable. In addition, a party may seek to set aside leave to enforce granted by the BVI Court.

## Conclusion

The Cayman and BVI Courts have proven to be user-friendly jurisdictions when it comes to the enforcement of foreign arbitral awards, and readily enforce arbitral awards in the absence of a compelling reason within the narrow compass of permissible exceptions not to do so. Enforcement should be considered prior to commencing any arbitral proceedings and appropriate advice should be taken in the jurisdiction(s) in which it is anticipated any award would be enforced.

---

Campbells attorneys in our offices in the Cayman Islands, British Virgin Islands and Hong Kong have a wealth of experience representing parties in arbitration and related proceedings in Cayman and the BVI, and routinely advise in relation to the enforcement of arbitral awards in both jurisdictions. Please do not hesitate to contact the authors should you have any questions. This note is intended to provide general guidance only and specific advice should be sought when required by reference to the circumstances of your case.

[1] Campbells' note concerning arbitration in the Cayman Islands and its potential advantages can be viewed here: <https://www.campbellslegal.com/client-advisory/rise-arbitration-cayman-islands-3319/>

[2] Campbells' note on this judgment can be viewed here: <https://www.campbellslegal.com/client-advisory/cayman-grand-court-refuses-to-enforce-foreign-arbitral-award-in-favour-of-brazilian-airline-4551/>



**Jane Hale**  
Partner



**Andrew Pullinger**  
Consultant

+852 3708 3026  
[jhale@campbellslegal.com](mailto:jhale@campbellslegal.com) [apullinger@campbellslegal.com](mailto:apullinger@campbellslegal.com)