

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION



FSD CAUSE NO: 17 of 2014 (ASCJ)

IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW
(1997 REVISION)

BETWEEN

(1) **GLOBEOP FINANCIAL SERVICES LLC**
(2) **GLOBEOP FINANCIAL SERVICES (CAYMAN) LIMITED**
PLAINTIFFS

AND

(1) **TITAN CAPITAL GROUP III LP**
(2) **TITAN ASIA VOLATILITY FUND LLC**
(3) **TITAN ASIA VOLATILITY FUND LTD**
(4) **TITAN VOLATILITY FUND OFFSHORE LTD**
(5) **TITAN GLOBAL RETURN FUND OFFSHORE LTD**
(6) **TITAN GLOBAL RETURN FUND LLC**
(7) **TITAN MULTI ASSET VOLATILITY SPV LLC**
(8) **TITAN ASIA VOLATILITY FUND LP**
(9) **TITAN GLOBAL RETURN FUND LP**
(10) **TITAN VOLATILITY FUND LP**
DEFENDANTS

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 23RD DAY OF APRIL 2014

APPEARANCES: Mr. Nick Dunne of Walkers for the Plaintiffs

RULING

1. This is an application made pursuant to the Foreign Arbitral Awards Enforcement Law (1997 Revision) and the Arbitration Law 2012 for leave to enforce an award made in arbitral proceedings held in New York.

2. According to Section 72(1) and (2) of the Arbitration Law 2012; where leave is given judgment may be entered in terms of the award and enforced in the same manner as a judgment or order of this court to the same effect.
3. The application is made by ex parte originating summons in accordance with the provisions of Grand Court Rules ("GCR") O.73 r.4 and r.31(1) which specify the form in which the application must be made and the information that must be provided in the statement in support of the application. This includes the relevant agreements which require the other parties to submit to arbitration.
4. The first Defendant is the administrator of the other Defendants which are investment funds, some of which (the second, sixth, and seventh) are domiciled in Delaware, U.S.A. and others of which (the third, fourth, fifth, eighth, ninth, and tenth)) are Cayman Islands domiciled fund companies.

Background

5. The facts surrounding the arbitration are set out in some detail in the First Affidavit of Ronald Rollereri ("Rolleri 1") sworn in support of this application. However, in very short summary, a dispute arose between the Plaintiffs who provided administrative and other professional services and the Defendants, in relation to certain fees claimed by the Plaintiffs as payable for those services.
6. Pursuant to the terms of the relevant agreements, the dispute was arbitrated in New York by Philip Lacovara, an arbitrator associated with the International Centre for Dispute Resolution. Following the hearing, a final award in favour of the Plaintiffs was entered in January 2014, ordering payment of a combined award of US\$567,500.02; inclusive of post-award interest at the rate of 9% per annum, arbitrators' fees and administrative expenses ("the Award").



Jurisdiction

7. The United States of America is party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 and accordingly, the Award is a Convention Award within the meaning of the Foreign Arbitral Awards Enforcement Law (1997 Revision) ("the FAAE Law"). By virtue of Section 5 of the FAAE Law, a Convention Award shall be enforceable in this Court subject to the provisions of the FAAE Law itself.
8. In fact, as Mr. Dunne submits, the position would be the same irrespective of whether the Convention was engaged as, by virtue of Section 72(5) of the Arbitration Law 2012, this Court is now required to recognise all arbitral awards, irrespective of where they were made, subject to the provisions of Sections 6 and 7 of the FAAE Law.
9. Section 72(5) of the Arbitration Law 2012 and Sections 6 and 7 of the FAAE Law provide respectively as follows:

Section 72(5):

"An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application to the court, shall be enforced subject (whether or not it is a convention award) to the provisions of Section 6 and 7 of the Foreign Arbitral Awards Enforcement Law, (1997 Revision)."

Sections 6 and 7 of the FAAE Law:

"6. The party seeking to enforce a Convention award shall produce –

- (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.*

7. (1) *Enforcement of a Convention award shall not be refused except in the cases mentioned in subsections (2) and (3).*

(2) *Enforcement of a Convention award may be refused if the person against whom it is invoked proves –*

(a) *That a party to the arbitration agreement was (under the law applicable to him) under some incapacity;*

(b) *That 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) *That he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*

(d) *Subject to subsection (4), that 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) *That 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; or*

(f) *That the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.”*

(3) *Enforcement of a Convention award 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.”*



10. The documents required to be produced by Section 6 of the FAAE Law are exhibited

to Rolleri 1. Accordingly, the only other matters that need to be considered by the

Court are the factors as set out above in Section 7(2) and (3) of the FAAE Law – those which would entitle the Court to refuse enforcement in the exercise of its discretion where any of the restrictions set out in subsection (2) paragraphs (a) – (f) or subsection (3) is proven.

11. Before the Court's discretion to refuse enforcement on any of the above grounds can be engaged, it is necessary for the party against whom the award is invoked to prove that a ground for refusal is present: see FAAE Law, Section 7(2).
12. The Plaintiff through Mr. Dunne, submits that no ground is present in the instant case upon which the Court could or should refuse to grant leave to enforce. The arbitration was validly conducted, asserts Mr. Dunne and the Award was rendered as final in accordance with the provisions of the arbitration agreement between the parties. No objection was raised with the arbitrator as to any procedural or jurisdictional challenges at the conclusion of the arbitration prior to the rendering of the Award.
13. Furthermore, following the entry of the Award, the Plaintiff commenced proceedings before the Supreme Court of the State of New York seeking confirmation of the Award. This is a procedure permitted under Section 7510 of the New York Civil Practice Law and Rules whereby the Court will confirm an award within one year of it having been made in the absence of vacation or modification of the award under Section 7511.
14. In response to those proceedings, the Defendants entered a brief in opposition alleging that the Award was procured by various instances of fraudulent conduct on the part of the Plaintiffs, and also that the Defendants were prejudiced by conflicts of interest on the part of their own legal representatives. Further, unjustified criticisms were also raised against the arbitrator himself; as Mr. Roller explains in his second



affidavit. These allegations were denied in their entirety by the Plaintiffs, and were not considered justified or material by the judge who heard the application, who instead dismissed the complaint and granted confirmation of the arbitral Award. Accordingly and as Mr. Dunne submits, as matters stand the award is binding not only as a matter of contract between the parties but also as a judgment of the New York Court.

15. The mere existence of the allegations of impropriety would in any event, be insufficient to engage the discretionary jurisdiction under Sections 7(2) and (3) of the FAAE Law. I accept that before the Court can refuse to enforce an award, it is necessary for the opposing party to prove that sufficient grounds exist upon which enforcement should be refused. I accept that this standard is not met at the ex parte stage simply on the basis of allegations having been made in confirmation proceedings elsewhere. It should also be noted that the allegations now made as to the Plaintiff's conduct during the arbitration were not made to the arbitrator prior to making the Award, notwithstanding that on the Defendants' account, they were in large part known to them at that time.

16. In the circumstances, I am persuaded to grant leave to enforce the Award within the Cayman Islands. This however, will be subject to any order that might be made on the application of the Defendants pursuant to GCR O.73 r.31(6) and (8) which respectively provide:

“6. *An order giving leave [to enforce] must be drawn by or on behalf of the creditor and must be served on the respondent by delivering a copy to him personally or by sending a copy to him at his usual or last known place of residence or business or in such other manner as the Court may direct; including electronically.*

....



8. *Within 14 days after 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, the respondent may apply to set aside the order and the award shall not be enforced until after the expiration of that period or, if the respondent applies within the 14 day period to set aside the order, until after the application is finally disposed of.”*

17. For the purposes of GCR O.73 r.31(8), the period I allow for the Defendants’ application will be 28 days.

Leave to serve out of the jurisdiction

18. As set out in *Rolleri 1* at paragraph 16, the First, Second, Sixth and Seventh Defendants are located out of the jurisdiction, and leave is sought by Mr. Dunne to serve these parties at both their registered office addresses in Delaware and their principal operational address in New York.

19. In terms of jurisdiction, this Court has a clear power to grant leave to serve out pursuant to GCR O.11 r.1(1)(m) as this is a claim brought for enforcement of an arbitral award.

20. In circumstances where there are a number of parties to the arbitration who are capable of being served within the jurisdiction and who are jointly and severally liable in respect of the award along with the out-of jurisdiction Defendants, it is submitted and I accept, that there is a compelling case for bringing all Defendants within the scope of the Cayman Islands proceedings, a fortiori where, as here, the entities in question are alleged to be under common control.

21. In *Masri v Consolidated Contractors International Company SAL [2011] (1) CILR 79* Jones J. of this Court stated that the Court would only exercise its discretion under O.11 r.1(1)(m) in order to enable a foreign judgment creditor to take steps towards



enforcement in the Cayman Islands, and thus it was necessary to show both a good arguable case and a reasonable expectation of a tangible benefit from a Cayman judgment, albeit that such benefit need not be direct and immediate.

22. In the instant case, there is plainly a good arguable case given the existence of an arbitral award and its subsequent recognition by the New York Court. As to the question of tangible benefit, it is not necessary to show (per Masri at paragraph 13) that there are assets within the jurisdiction, but simply that there is a reasonable expectation of a benefit from such a judgment. In circumstances where the out-of-jurisdiction Defendants are part of a group under common control with close links to the Cayman Islands, I regard it as more than merely speculative to hold that there is a reasonable prospect that recognition of the judgment will provide a tangible benefit. I consider that it could be also unfortunate if a situation were to arise where the same arbitral award was only enforceable against some, as opposed to all, of the paying parties within a given jurisdiction.

23. Furthermore, as shown above, the provisions of Section 72(5) of the Arbitration Law now place a positive obligation upon the Court to recognise all arbitral awards as binding, absent grounds for refusal under the provisions of Section 6 and Section 7 of the FAAE Law. It would clearly be incompatible with the scheme of the Arbitration Law if I were to decline to permit service out of the jurisdiction, as this would amount to a practical and *de facto* refusal to enforce the award.

24. In this regard, it is also important to note the special jurisdiction concurrent with that vested by O. 11 r.1(1)(m) for leave to serve out which is vested by GCR Order 73 r.31(1) and (2) in the following terms:



- “31. (1) *An application for leave under Section 52 or 72 of the 2012 Law or under Section 5 of the 1975 Law [the F.A.A.E. Law] to enforce an arbitral award, shall be made by ex-parte originating summons.*
- (2) *The Court hearing an application under paragraph (1) may direct that the application is to be served on such parties to the arbitration as it may specify and service of the application out of the jurisdiction is permissible with the leave of the Court irrespective of where the award is, or is treated as, made.”*

25. This is a provision – along with other provisions which expanded the scope of O.73 – which was introduced following the passage of the Arbitration Law 2012, to recognize and to give effect to the rights of parties to settle their disputes by way of arbitration. R.31(2) can be invoked for leave to serve out where the court has determined that the application to enforce an award should be served upon a respondent who is outside the jurisdiction notwithstanding that an order for enforcement has been made on the ex parte basis. This is so also notwithstanding that pursuant to r.3(7), leave would not be required for service out of the order for enforcement itself.

26. As Mr. Dunne submits and I accept, the change in the law following the passing of the Arbitration Law is such that the criteria to be applied by the Court in determining whether to exercise its jurisdiction under GCR O.11 r.1(1)(m) will vary depending on whether the enforcement action in question relates to a judgment or an arbitral award and that in the latter case, the default position is that leave should be granted unless



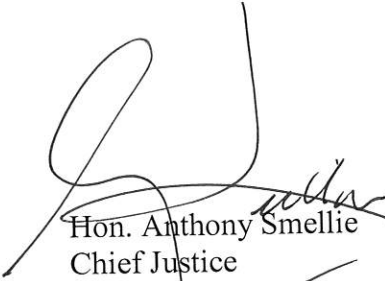
there is some reason to think that the award is impeachable under the provisions of the FAAE Law.

27. In the circumstances, I grant leave to serve:

- (i) the application brought by ex parte originating summons;
- (ii) the evidence in support; and
- (iii) the order for leave to enforce the Arbitral Award

outside the jurisdiction upon the first, second, sixth and seventh Defendants at their registered offices and principal operational addresses in Delaware and New York respectively.

28. To the extent that any of the Defendants wish to argue against enforcement, they are of course entitled to do so pursuant to GCR O.73 r.31(8) by the return date and the enforcement of the award is stayed until that date.


Hon. Anthony Smellie
Chief Justice

April 25, 2014

