



Foreign Arbitral Awards: No Prior enforcement needed for reliance in insolvency proceedings

The Bahamas Supreme Court gave an important judgement regarding the efficacy of foreign arbitral awards for being relied upon as the basis of a statutory demand to evidence insolvency of the debtor in the liquidation case of *In the Matter of BHP International Markets Limited* 2016/COM/bnk/0038. The Court held that prior enforcement of the foreign award under the *Arbitration (Foreign Arbitral Awards) Act, 2009* was not necessary and it dismissed opposition to the statutory demand.

Background

BHP International Markets Limited (“**Company**”) was an International Business Company incorporated in The Bahamas. Wason Holding Limited (“**Petitioner**”) was a creditor that had obtained a foreign arbitral award against the Company following an arbitration conducted in Hong Kong pursuant to the UNICITRAL Arbitration Rules. The Petitioner served the Company with a statutory demand based upon the foreign arbitral award. No prior enforcement was obtained under the Bahamian arbitration regime which contains a procedure for enforcement of foreign arbitral awards in The Bahamas.

The Company sought to have the statutory demand set aside on several grounds, including an argument that the foreign arbitral award must first, by an application for enforcement, be recognized and domesticated as a Bahamian debt before it may be relied upon in The Bahamas. Counsel for the Petitioner countered that it was not necessary first to have commenced enforcement proceedings and that, if the Court were to accept the Company’s argument that prior enforcement of the arbitral award were necessary to form the basis of a statutory demand, a natural consequence would be that only judgment creditors would be able to commence liquidation proceedings, which cannot be what Parliament intended. The Petitioner further contended that a creditor has various options available to him and may pursue his rights how he so chooses in accordance with statute.

Judgment

After extensive review of the companies’ liquidation regime pertaining to statutory demands and the arbitration regime regarding enforcement of foreign arbitral awards, the Honourable Mr Justice Ian Winder of the Commercial Division held:

“I do not accept the Company’s arguments that [the Petitioner] is precluded from issuing a statutory demand with respect to the payment of sums awarded in a foreign arbitral award. It is clear that the *Arbitration (Foreign Award) Act, 2009 (AFAA)* does not



impose a duty or mandatory obligation on a party in whose favour the award is granted to first enforce that award locally in order to rely upon it...

The AFAA was never set up to restrict the beneficiary of a foreign award but to facilitate such a person by treating his foreign award as a domestic award, in the appropriate circumstances. The issuance of a statutory demand following a foreign award and enforcement of that award are not parallel processes but separate and distinct matters.

To require a creditor to seek to enforce his foreign award before he could issue a statutory demand cannot be supported as neither the *Companies Act*, the AFAA, nor the *Arbitration Act* requires it.”

The Company’s opposition to the statutory demand was dismissed and the Company ordered to be wound up on grounds that it was insolvent and that it was just and equitable.

Mr John K F Delaney QC argued for the Petitioner while Mr Thomas Evans QC argued for the Company.

For more information please contact John K F Delaney QC, Giahna Soles-Hunt or your usual Delaney Partners contact.

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