



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 328 OF 2022(IKJ)

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

AND IN THE MATTER OF SECTIONS 52, 54 AND 72 OF THE ARBITRATION ACT, 2012

**AND IN THE MATTER OF AN ARBITRATION BETWEEN MR NASSER SULAIMAN H M AL-
HAIDAR (Claimant) AND MR JETTY VENKATA UMA MAHESHWARA RAO (First
Respondent) AND PETRONASH GLOBAL LTD (Second Respondent)**

BETWEEN:

MR NASSER SULAIMAN H M AL-HAIDAR

Plaintiff

V

MR JETTY VENKATA UMA MAHESHWARA RAO

Defendant

IN CHAMBERS

Appearances: Mr Liam Faulkner of Campbells LLP, for the Plaintiff

Before: The Hon. Justice Kawaley

Heard: On the papers

Date of decision: 13 January 2023

Draft Reasons Circulated: 25 January 2023

1

230203- In the matter of Al- Haidar v Rao et al. - FSD 328 of 2022(IKJ) Reasons for Decision

Reasons for decision Delivered: 3 February 2023

INDEX

Leave to enforce foreign interim arbitration award-governing principles-Foreign Arbitration Awards Enforcement Act (1997 Revision), sections 5-7-Arbitration Act, 2012 sections 52, 72

REASONS FOR DECISION

Introductory

1. By an Ex Parte Originating Summons dated 23 December 2022, the Plaintiff applied for leave “to enforce the Provisional Award dated 16 November 2022 awarded in DIAC Arbitration No. 60 of 2022 by a Tribunal constituted by Michael Black KC, Sapna Jhangiani KC and Professor Sir Bernard Rix (Presiding Arbitrator), read with the Tribunal’s responses dated 16 November 2022 to the Defendant’s application to discharge, suspend or modify the Provisional Award, and to other requests to modify and/or clarify the Provisional Award (the ‘Provisional Award’), in the same manner as a judgment or order of the Court to the same effect”.
2. Having determined it was appropriate to deal with the application on the papers, on 13 January 2023 I granted the relief sought on the Ex Parte Originating Summons.
3. As counsel submitted that there appeared to be no published local judgments on the enforceability of interim awards, it was clearly desirable that reasons should be given for that decision, which I now provide.

Governing legal principles

General enforcement principles

4. In *Lam Global Management Ltd. II and Lam Global Management Ltd. III-v-AGPL Investment Ltd.*, FSD 226/2022 (IKJ), Judgment dated 13 December 2022 (unreported), I considered the legal principles governing granting ex parte leave to enforce a final foreign award under section 5 of the

2

230203- In the matter of Al- Haidar v Rao et al. - FSD 328 of 2022(IKJ) Reasons for Decision

Foreign Arbitral Awards Enforcement Act (1997 Revision) (the “FAAEA”). In paragraph 8 of my Judgment in that case, I noted that: “*An ex parte application is expressly provided for. The pro-enforcement policy of the New York Convention is well recognised by this Court and understood.*” I cited the observation of Martin JA in *Essar Global Fund Ltd v Arcelormittal USA LLC* [2021 (1) CILR 788] that “[i]n the majority of cases, obtaining leave to enforce an award is a straightforward matter” (at paragraph 14).

5. 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: *Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) v MatlinPatterson Global Opportunities Partners (Cayman) II LP and Others* [2022] UKPC 21 (per Lord Hamblen and Lord Legatt at paragraph 23).

Enforcement under the FAAEA

6. The FAAE provides as follows:

“5. A Convention award shall, subject to this Law, be enforceable in the Grand Court in the same manner as an award under section 22 of the Arbitration Law (1996 Revision) and shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Islands and any reference in this Law to enforcing a Convention award shall be construed as including references to relying upon such award.”

7. The Arbitration Act, 2012 (the “2012 Act”) provides:

“Award may be enforced like judgment or order of court

72. (1) An award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the arbitral tribunal lacked jurisdiction to make the award.

(4) Nothing in this section affects the recognition or enforcement of an award under any other written law or rule of law and in particular the provisions of the Foreign Arbitral Awards Enforcement Law, 1997 relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

(5) 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 a convention award) to the provisions of sections 6 and 7 of the Foreign Arbitral Awards Enforcement Law, (1997 Revision).”

Does section 5 of the FAAEA extend to foreign interim awards?

8. Section 2(1) provides: “‘Convention award’ means an award made in pursuance of an arbitration agreement in the territory of a State, other than the Islands, which is a party to the New York Convention”. The Plaintiff’s counsel submitted that:

“32. In the present case, a highly distinguished Tribunal considered the issue of whether to issue an order or an award and proceeded to issue a provisional award. In doing so, the Tribunal referred to the leading academic work of Born, *International Commercial Arbitration*, (3rd ed, 2021) at pp 2692- 26933. We would also note the following extract from the same academic textbook at page 2703:

‘The better view is that provisional measures should be and are enforceable as arbitral awards under generally applicable provisions for the recognition and enforcement of awards in the sense that they dispose of a request for relief pending the conclusion of the arbitration, which should be sufficient to justify treating such measures as “awards”.

Orders granting provisional relief are meant to be complied with, and to be enforceable, outside the arbitral process; they are in this respect different from interlocutory arbitral decisions that merely decide certain subsidiary legal issues (e.g. choice of law, liability) or prescribe procedural directives (such as timetables or hearing logistics), which are ordinarily neither 'final' nor 'awards'. It is also highly important to the efficacy of the arbitral process for national courts to be able to enforce provisional measures. If this possibility does not exist, then parties will be able, and significantly more willing, to refuse to comply with orders of provisional relief, resulting in precisely the serious harm that provisional measures were meant to foreclose.

In contrast, there is no sound policy reason for withholding judicial enforcement mechanisms for tribunal-ordered provisional measures. The most serious concern would appear to be that national courts would be required repeatedly to enforce, and then possibly readjust their enforcement measures, if an arbitral tribunal altered the provisional relief it ordered. In reality, these sorts of alterations seldom occur and, if judicial enforcement were available, parties would almost invariably comply with tribunal-ordered provisional relief without the need for judicial enforcement.”

9. It was further argued:

“34. Befitting of Singapore’s status as an international arbitration hub, the Singapore High Court has previously considered the issue and held that foreign interim or provisional awards can be enforced in Singapore: see CVG v CVH [2022] SGHC 249; and PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) and another matter [2014] SGHC 146. In the PT Perusahaan Gas case, the Singapore High Court confirmed that a ‘provisional award’ is an award granting relief which is intended to be effective for a limited period, such as the period pending determination with finality of every aspect of the parties’ dispute, and that a provisional award is final and binding on its subject matter. The Singapore High Court also cited with approval the authoritative statement from Born on International Commercial Arbitration which is recited at paragraph 32 above. These decisions are consistent with other identified decisions of foreign national courts such as the decision of the Higher Regional Court of Thuringia, Germany dated 8 August 2007 where the court ruled that binding interim awards of a

5

230203- In the matter of Al- Haidar v Rao et al. - FSD 328 of 2022(IKJ) Reasons for Decision

foreign arbitral tribunal were capable of being declared enforceable and that the designation of the award as ‘interim’ was not a bar to enforcement.”

10. *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) and another matter* [2014] SGHC 146 did not support the proposition that “award” in the FAAEA should be construed as including a provisional or interim award. Justice Vinodh Coomaraswamy, in a typically lucid judgment, merely held that under the legislation governing Singapore-seated arbitrations it was clear that jurisdiction was conferred on domestic tribunals to make provisional orders. However, in *CVG v CVH* [2022] SGHC 249, Chua Lee Ming J explicitly “concluded that the term ‘foreign award’ in s 29 of the International Arbitration Act 1994 (2020 Rev Ed) (‘IAA’) includes foreign interim awards made by an emergency arbitrator and thus, the Award may be enforced in Singapore”. However, the real controversy in that case was whether or not the Singapore statute applied to “emergency arbitrators”. It was clear that the foreign award enforcement statute did extend to interim awards:

“26 The definition of “arbitral award” in s 27(1) of the IAA also includes an order or direction made by an ‘arbitral tribunal in the course of an arbitration in respect of any of the matters set out in section 12(1)(c) to (j)’. The term ‘arbitral tribunal’ is defined in s 2(1) to include “an emergency arbitrator”. However, s 2(1) does not apply to Part 3 of the IAA, which is where ss 27 and 29 are found. There is no definition of ‘arbitral tribunal’ in s 27(1) or anywhere else in Part 3 of the IAA.”

11. There was accordingly no judicial authority in support of the proposition that the term “award” in a foreign arbitration enforcement statute should, without more, be construed as including an interim as well as a final award. This limb of the application, resting on academic text authority alone, was too ambitious to be accepted in the context of the present ex parte application on the papers where the Plaintiff had a far more solid alternative jurisdictional argument.

Are foreign interim awards in any event enforceable under the FAAEA as read with the 2012 Act?

12. Section 5 of the FAAEL expressly provides that foreign awards shall be enforced in the same manner as awards under the domestic arbitration statute then in force, but only “*subject to this Law*

[Act]”. Section 72 (4)-(5) of the 2012 Act confirm that as regards foreign awards, the provisions of the FAAEL hold sway over those of the 2012 Act. The relevant subsections are the following:

- (a) section 72(4) provides that section 72 does not affect the enforcement of an award under the FAAEL;
 - (b) section 72 (5) provides that foreign awards shall be enforced in accordance with sections 6 and 7 of the FAAEL, which specify the evidence to be adduced and the New York Convention conforming grounds for refusing enforcement, respectively; and
 - (c) in the context of enforcing final foreign awards, section 72 has been regarded as the principal provision of the 2012 Act with which section 5 of the FAAEA interacts.
13. The 2012 Act is now referred to on the assumption that the reference to the 1996 Act in section 5 of the FAAEA as originally enacted must now be construed as a reference to the 2012 Act, the successor statute of the 1996 Act¹. When the 1996 Act was replaced by the Arbitration Act 2001 Revision, foreign awards were enforced pursuant to section 5 as read with the Arbitration Act then in force: see e.g. *Walker International Holdings Limited and AF -Cap Incorporated v. Olearius Limited, Société Nationale des Petroles du Congo, Caisse Congolaise d’Amortissement and Republic of Congo* [2003 CILR 457] (Smellie CJ). Since section 5 itself only provides for enforcement under the 2012 Act “*subject to*” the terms of the FAAEA, I accordingly, accepted the following submission of Mr Faulkner:

“35. *The Arbitration Act, 2012 applies to arbitrations where the seat of the arbitration is in the Cayman Islands and to every arbitration under any other enactment except insofar as the Act is inconsistent with that other enactment or with any rules or procedures authorised thereunder...*”

¹ Section 25 of the Interpretation Act (1995 Revision) provides:

“(1) *Where any Law repeals and re-enacts, with or without modification, any provision of any Law in force, reference in any other Law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.*”

14. The 2012 Act, however, also most pertinently for present purposes expressly provides for the enforcement of provisional or interim awards. Mr Faulkner rightly submitted:

“36. Part VIII of the Arbitration Act governs interim measures and preliminary orders. Section 44 provides the arbitral tribunal with the power to order interim measures and section 52 provides as follows under the sub-heading ‘Recognition and enforcement’:

‘52 (1) An interim measure issued by an arbitral tribunal shall be recognised as binding and unless otherwise provided by the arbitral tribunal, enforceable upon application to the court, irrespective of the jurisdiction in which it was issued, subject to section 53. (Emphasis added)

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court may order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.’

37. Section 53 of the Arbitration Act contains the following provisions under the sub-heading ‘Grounds for refusing recognition or enforcement’:

‘53 (1) The recognition or enforcement of an interim measure may be refused only at the request of the party against whom it is invoked if the court is satisfied that –

(a) a refusal is warranted on any ground specified in section 75(1)(a)(i) to (vii);

(b) the arbitral tribunal’s decision with respect to the provision of the security in connection with the interim measure issued by the arbitral tribunal has not been complied with;

(c) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court or under the law of which that interim measure was granted; or

(d) the court finds that –

(i) the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Islands or the recognition or enforcement of the award would be contrary to the public policy of the Islands.

(2) Any determination made by the court on any ground in subsection (1) shall be effective only for the purposes of the application to recognise and enforce the interim measure.

(3) The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.”

15. These are freestanding special enforcement provisions, explicitly applicable “*irrespective of the jurisdiction in which it was issued*”, governing interim “*measures*” on a separate basis to “*awards*”. There is no inconsistency with the provisions of the FAAEA which does not explicitly deal with interim measures or awards at all. How do these provisions interface with the FAAEA, if at all? These provisions may be viewed as either:

- (a) intended to extend the pre-existing foreign award enforcement regime under section 5 of the FAAEA to an “*interim measures*” as well; or
- (b) creating an entirely separate enforcement regime for foreign interim “*measures*” under the 2012 Act leaving section 5 to deal with final awards only.

16. The Plaintiff's counsel did not consider (a) as an option, only positing (b) as an alternative to his primary argument that section 5 of the FAAEL, according to its own self-contained terms, applied to interim or provisional awards as well as final awards. He submitted:

“38. In addition to its jurisdiction to recognise and enforce the Provisional Award under the Enforcement Act (which is intended to be a simplified process), the Court also has jurisdiction to do so under section 52 of the Arbitration Act, albeit that provision is only engaged if the application under the Enforcement Act should fail for any reason.

39. Furthermore, pursuant to section 54 of the Arbitration Act, the Court has a standalone power to issue interim measures in support of domestic or foreign arbitration proceedings: ...”² [Emphasis added]

17. In the context of adjudicating an ex parte application on the papers, I adopted a somewhat rough and ready approach. The FAAEA has since it was enacted in 1997 consisted of a combination of its own internal provisions and those incorporated by reference from the main arbitration statute. Prior to the enactment of the 2012 Act, the FAAEA only unarguably applied to final awards because there was seemingly no provision for the enforcement of foreign interim awards or measures under the Arbitration Acts previously in force³. Once the 2012 Act introduced through section 52 a regime for enforcing foreign interim remedies, I preferred the view that the scope of section 5 (including the meaning of the term “award”) was implicitly expanded to incorporate not just the final award enforcement provisions of the 2012 Act but the interim measure enforcement provisions as well. This approach preserves the traditional view of the FAAEA as the umbrella statute governing the

² Section 54 is reproduced here because in a recent case I accepted an apparent consensus between counsel that no statutory basis for making interim orders in aid of foreign arbitration proceedings existed: *In the Matter of Principal Investing Fund I Ltd et al*, FSD 268-270 (IKJ), Judgment dated 26 January 2023 (unreported). It provides:

“54. (1) A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their seat of arbitration is in the Islands, as it has in relation to the proceedings in court.

(2) The court shall exercise those powers in accordance with its own procedures and in consideration of the specific principles of international arbitration.”

³The evolution of the law reform process is documented at <http://www.lrc.gov.ky/projects/ARBITRATION>.

enforcement of foreign arbitration awards which incorporates to the extent necessary the substantive enforcement provisions found in the general Arbitration Act.

18. I accordingly, not without some anxiety as to whether the alternative jurisdictional basis under the 2012 Act ought not have been included in paragraph 1 of the Order on its face out of an abundance of caution, granted an Order in the following relevant jurisdictional terms⁴:

“I. Pursuant to section 5 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) leave be granted to enforce the Provisional Award in the Cayman Islands in the same manner as a judgment or order of this Court to the same effect.”

19. If this approach were shown to be technically unsound, I had little doubt that this Court had jurisdiction to grant leave to enforce the Provisional Award under section 52 of the 2012 Act if that ought properly to be construed as entirely detached from section 5 of the FAAEA. If it was necessary to view the FAAEA as dealing exclusively with final awards and the enforcement of interim awards being governed by the 2012 Act alone, the practical legal result was the same: foreign interim arbitration awards or measures, whatever nomenclature they may be given, are clearly enforceable under Cayman Islands law.

Summary

20. For these reasons on 13 January 2023, I granted the Plaintiffs leave to enforce the Provisional Award.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

⁴ The rest of the Order set out the terms of the interim relief sought, substantially in the term of the Provisional Award made by the Tribunal.