

Strengthened collaboration between BVI and PRC: a precedent of enforcing a PRC arbitral award

Briefing Summary: The British Virgin Islands and the People's Republic of China are both contracting states to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention 1958**"). These two jurisdictions recently forged closer ties, with the BVI International Arbitration Centre and the Shenzhen Court of International Arbitration ("**SCIA**") signing a cooperation agreement on 11 January 2024. In tandem with the increasing collaboration between these two jurisdictions in the realm of international arbitration, the BVI High Court handed down its judgment in *Qu Haiping v Window of Trade International Limited & Ors* BVIHCOM 2022/0169 ("**Window of Trade**") on 29 December 2023, where the BVI Court enforced an arbitration award (the "**Award**") of the SCIA in the BVI.

Location: British Virgin Islands, Hong Kong SAR, Singapore

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Background

In *Window of Trade*, the Claimant applied to the BVI Court to enforce the Award in favour of the Claimant. The Award required the Second Defendant to return 100% of the equity in the First Defendant, a BVI company, to the Claimant and to assist the Claimant in restoring its name to the register of members of the First Defendant. The Second Defendant opposed the enforcement of the Award.

The Second Defendant advanced four bases to oppose the Claimant's application to enforce the Award:

1. The Award contained decisions on matters beyond the scope of the arbitration;
2. The Second Defendant's inability to present his case at the arbitration;
3. The Second Defendant's concerns over the composition of the arbitral tribunal; and
4. An application had been made to a competent authority in the PRC to suspend enforcement of the Award.

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The BVI Court's ruling

The fourth ground of objection (as stated in paragraph (iv) above) fell away before the BVI Court handed down its judgment, given that the PRC Court delivered a judgment in March 2023 dismissing the application to suspend enforcement of the Award. The BVI Court accordingly considered the three other grounds.

(i) The Award contained decisions on matters beyond the scope of the arbitration

In respect of objection (i), the Second Defendant's argument is, in essence, that certain parties (which are not the target of the enforcement proceedings in the BVI) were not a party to the arbitration agreement; the Award (as it concerns these parties) went beyond the scope of the submission to arbitration.

The BVI Court, however, considered such an objection to be misconceived. Given that the Second Defendant was a party to the arbitration agreement, an arbitral award ordering him to return equity in the First Defendant and restore registration in the Claimant's name should be enforced by the BVI Court. In enforcing such an award, the Court is not making any order against non-parties to the arbitration agreement.

Further, the Second Defendant had relied on a PRC opinion on foreign law as evidence for objecting to the enforcement. That legal opinion was however not drafted for the purposes of use in these BVI proceedings. It was not in compliance with the BVI civil procedure rules. In any event, it did not state that the order compelling the Second Defendant to restore the Claimant to the First Defendant's register of members was an order outside the scope of the arbitration.

(ii) Inability to present his case at the arbitration

In respect of objection (ii), the Judge found that the Second Defendant did not, in fact, have evidence that he was "unable to present his case" to the arbitration. Rather, the arbitral tribunal rejected his attempt to adduce and admit further (late) evidence, as it was in violation of the arbitration rules. The Second Defendant's own PRC legal opinion did not say that failure to admit the further (late) evidence rendered the award unenforceable or liable to be set aside.

(iii) Second Defendant's concerns over the composition of the arbitral tribunal

The Second Defendant's third ground of complaint was, amongst other matters, that the arbitrator failed to disclose that he and the Claimant's legal representatives in the arbitration were close friends and alumni from the same PRC law school. It was alleged that such circumstances demonstrated a real risk of apparent bias on the part of the arbitrator.

The BVI Court rejected this argument as falling short of the burden of proof. The Second Defendant had adduced no legitimate evidence in support of the objection, other than his own self-serving assertions.

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Conclusion

The BVI Court eventually ordered that the Award be enforced and the First Defendant's register of members be rectified.

The BVI Court referred to the Privy Council judgment of *Cukurova Holding A.S. v Sonera Holding BV* [2014] UKPC 15 (an appeal from the BVI High Court), where the Board opined that there were narrow grounds upon which the court can refuse to enforce an award made under the New York Convention, and the general approach to enforcement of an award should be pro-enforcement.

The judgment in *Window of Trade* demonstrated that the BVI Courts continue to adopt a pro-enforcement approach towards New York Convention awards. The burden is on the defendant opposing the enforcement of a convention award in BVI to provide "good reasons".



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