WeirFoulds LLP

Commercial Litigation Insights: Navigating the Caribbean Waters: Enforcing Canadian Judgments and Arbitral Awards in the Caribbean

September 3, 2024

By Bota McNamara

The enforcement of Canadian judgments and arbitral awards in the Caribbean[1] can be increasingly complex due to varying local laws and recognition protocols. As the English jurist Lord Nicholls of Birkenhead stated (in the context of an application for a Mareva or freezing order):

"The defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which the defendant can escape out of sight and become unreachable."[2]

In many cases, the form of the decision, forum in which it was made, and applicable international laws will shape a party's options in seeking to enforce a foreign judgment or arbitral award. In this blog, we explore how to enforce a Canadian judgment or award in the Caribbean.

There are four primary mechanisms[3] of enforcing judgments or awards from Ontario and Canada more broadly, in the Caribbean:

(1) the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (the "**New York Convention**");
(2) the United Nations Committee on International Trade Law (UNCITRAL) *Model Law on Cross-Border Insolvency* (1997) ("**Model Law**");
(3) legislation enabling the reciprocal enforcement of foreign judgments; and
(4) the common law principle of comity.

---

(1) The New York Convention

The New York Convention was established in recognition of the increasing importance of international arbitration in resolving international commercial disputes.[4] The New York Convention allows for the enforcement of arbitral decisions within party states, subject to limited exceptions and state specific reservations or declarations, by recognition of an arbitral award of one state in another. By becoming party to the New York Convention, states undertake to enforce arbitral decisions made in other states, among other obligations.[5]

Article V (1), (2) of the New York Convention sets out an exhaustive list of exceptions to the enforcement of an award. The exceptions

are as follows:

- a party to the agreement was under some form of incapacity;
- a party to the agreement was not given proper notice or was unable to present his or her case;
- the award contains decisions on matters extending beyond the scope of submission to arbitration, or otherwise addresses a difference not falling within terms of submission to arbitration;
- the composition of the arbitral authority or procedure was inconsistent with the agreement of the parties or with the laws of the country where the arbitration was held; and
- the agreement has not yet become binding on the parties or was set aside under the law of the country in which the award was made.[6]

Recognition may also be refused if the authority in the country where enforcement is sought finds that the award cannot be settled by arbitration in that country, or that recognition or enforcement of the award would be counter to public policy in that country.[7]

Canada is a party to the New York Convention.[8] Additionally, the following countries in the Caribbean region are parties: Antigua and Barbuda, The Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Guyana, Jamaica, Saint Vincent and the Grenadines, and Trinidad and Tobago.[9]

(2) The Model Law

In similar operation to the New York Convention, the Model Law allows for any bankruptcy or an order or judgment arising in a bankruptcy to be enforced in a country that has adopted the appropriate framework legislation. While insolvency is not a monetary award, litigants are able to use insolvency as a means of recovery or enforcement of an award. In Canada, a modified version of the Model Law is incorporated in Part XIII of the federal *Bankruptcy and Insolvency Act* and Part IV of the *Companies' Creditors Arrangement Act*.[10]

Under the Model Law, a person authorized to administer the debtor's property or act as a representative in the Canadian proceeding can apply to the court of a foreign jurisdiction for an order recognizing the proceeding.[11]

The following countries in the Caribbean have enacted versions or variations of the Model Law or have enacted laws in aid of foreign insolvency proceedings for individuals or corporations or both: The Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Grenada (not in force), Jamaica, Saint Kitts and Nevis (not in force), Saint Vincent and the Grenadines, Trinidad and Tobago, and the Turks and Caicos Islands.

In addition to the Model Law or laws in aid of foreign insolvency proceedings is the complementary "Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters" from the Judicial Insolvency Network (the "**JIN Guidelines**").[12] The JIN Guidelines enable uniform communication and cooperation between courts in cross-border insolvency matters.[13]

In Canada, two major hubs for insolvency matters have adopted the JIN Guidelines: the Commercial List of the Superior Court of Justice, and the Supreme Court of British Columbia.[14] In the Caribbean, the following courts have adopted the JIN Guidelines: The Supreme Court of Bermuda, The Eastern Caribbean Supreme Court, The Grand Court of the Cayman Islands, and The Supreme Court of The Bahamas.[15]

(3) Reciprocal Enforcements

Many countries in the Caribbean and the United Kingdom have also adopted national legislation authorizing the reciprocal

enforcement of foreign judgments. Currently, Canada's reciprocal enforcement of judgments legislation does not extend to the Caribbean. As such, this would not be an avenue that on the face of it looks available for the enforcement of awards. However, under the United Kingdom's *Foreign Judgments (Reciprocal Enforcement) Act 1933*, judgments from Canada are registered in the United Kingdom and are treated as if the judgment had been a judgement originally given in the United Kingdom.[16] Recognition of an award or judgment from the United Kingdom is virtually automatic under the respective reciprocal enforcement laws of the Caribbean.

While this attempt at forum 'hopping' may become complex and lengthy and there is no jurisprudence on the subject known to the authors, a successful navigation of this legislative matrix would allow for the enforcement of a Canadian judgment in the Caribbean without the having to commence litigation anew based on the Canadian judgment.

(4) The Common Law Principle of Comity

Lastly, in countries where the above enacted mechanisms are not available, parties may seek the reciprocal enforcement of a judgment through the common law principle of international comity. Comity is defined as the recognition allowed by one nation to the laws or judgement of another, with regard for convenience and international duties.[17] To utilize the common law principle of comity, parties may cause a Canadian court to request of a Caribbean court's assistance in the recognition and enforcement of the Canadian court's judgment. Where appropriate, parties would apply to the Court in the Caribbean seeking recognition and enforcement of their award.

The courts of the Caribbean are able to ensure that one way or another, a debtor operating in the Caribbean cannot so easily defeat the judicial process. If the mechanisms and common law principles discussed above cannot be leveraged to ensure the enforcement of Canadian decisions in the Caribbean, a party seeking to enforce a Canadian judgment in the Caribbean may have to commence a new action wherein the Canadian award is pleaded as the basis of the action. This does not mean that a party would have to go through a trial process to obtain judgment. Under the right circumstances, summary judgment would be an available route to commencing execution or enforcement proceedings.

Bota McNamara will present further on this topic at The Six-Minute Debtor-Creditor and Insolvency Lawyer 2024 for the Law Society of Ontario on October 16, 2024.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] For the purposes of this blog, the term "Caribbean" includes the following English-speaking jurisdictions that have adopted the United Kingdom common law (or similar based jurisprudence) in the Caribbean Basin: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago. We also include the British Overseas Territories of: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands.

[2] *Mercedes Benz AG v Leiduck* [1996] AC 284 (PC) at para 305.

[3] The first three of these methods are mechanisms of formal international law.

[4] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (UNCITRAL).

[5] "Introduction" in *1958 New York Convention* Guide (The New York Convention) at para 3.

[6] "Article V" in *1958 New York Convention Guide* (The New York Convention).

[7] *Ibid*.

[8] "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (UNCITRAL).

[9] *Ibid*.

[10] **(1)** RSC, 1985, c B-3 **["*BIA*"]**; **(2)** RSC 1985 c C-36.

[11] *BIA*, at ss. 269, 270.

[12] "JIN Guidelines" (Judicial Insolvency Network).

[13] *Ibid*.

[14] *Ibid*.

[15] *Ibid*.

[16] *Foreign Judgments (Reciprocal Enforcement) Act 1933*, c13.

[17] *Spencer v The Queen* [1985] 2 SCR 278 at para 8, citing *Hilton v Guyot,* 159 US 113 (1895).

For more information or inquiries:

Bota McNamara

Toronto
647.715.3559

Email:
bmcnamara@weirfoulds.com

Bota McNamara is a Partner in the Caribbean & Offshore Practice Group and Commercial Litigation Practice Group at WeirFoulds LLP.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035