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No reason why Bermuda's common law should adopt an "antiquarian approach" to third-party litigation funding agreements

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Stiftung Salle Modulable and Rütli-Stiftung v Butterfield Trust (Bermuda) Limited (2014) Bda LR 13

A recent judgment of the Bermuda Supreme Court has held a third-party litigation funding agreement to be valid and suggested that use of such financing should be encouraged by Bermuda's courts.

In the recent case of Huawei Tech Investment Co Ltd and another v Sampoerna Strategic Holdings Limited 2014 Bda LR 8, the Bermuda Supreme Court demonstrated its commitment to the support of arbitration as an alterative method of dispute resolution in international commercial cases. It did so by refusing to set aside an order it had previously made without notice permitting the enforcement of a foreign arbitral award against a Bermuda company.

On 9th October 2013 Mr. Justice Hellman of the Bermuda Supreme Court granted a without notice application by two related entities, one a Hong Kong company, the other a Singaporean company, to enforce a consolidated arbitration award against a Bermuda company. The order (if allowed to stand) would have permitted the Applicant companies to enforce the award against the Bermuda company as if it was a judgment of the Supreme Court; leading ultimately, if the debt was not paid, to the possible winding up of the Bermuda company.

The Bermuda debtor company sought to set aside the Order on the basis that there was a denial of its natural justice rights in the arbitration proceedings in Singapore. It claimed that the arbitration tribunal's decision dealt with an issue that was outside the scope of the questions the tribunal was asked to decide; and that the arbitration tribunal based its decision on a matter that was not pleaded in the statement of claim.

However, the Chief Justice, who heard the set aside application held that, although the issue had not been expressly pleaded, it was dealt with in the evidence and in the oral and written submissions of the parties in the arbitration hearing. The Chief Justice treated the debtor company's point as a purely technical one. He held that there was no denial of the Bermuda company's natural justice rights, namely the opportunity to present its case in the arbitration. The Chief Justice therefore dismissed the Bermuda company's application leaving it open for the award creditors to enforce their rights to payment in Bermuda.

In the course of the Chief Justice's decision he said: "The Bermudian courts have on many occasions stressed the strong public policy in favour of enforcing foreign arbitral awards which is reflected in the legislative scheme. It must not be forgotten that the leading Bermudian authority on enforcement of awards made in Convention countries is of some 25 years' vintage; the Court of Appeal for Bermuda decision in Soujuznefteexport v Joc Oil Ltd (1989) Bda LR 11.

The claimants were represented by David Kessaram and Lilla Zuill of Cox Hallett Wilkinson. See Court decision here.