Cayman Islands Court of Appeal allows appeal against a refusal to enforce a foreign arbitral award

The Cayman Islands Court of Appeal ("**CICA**")[1] has allowed an appeal against the February 2019 Grand Court judgment of Mangatal J[2] in which Her Ladyship refused to enforce a decade-old Brazilian arbitral award on the grounds that, *inter alia*, (i) the Defendants (the "**MP Funds**") were not parties to the arbitration agreement and (ii) in any event, the arbitral award ruled on claims which both fell outside the scope of the arbitration agreement and were neither pleaded nor argued before the tribunal. The CICA's judgment will be of interest to users of arbitration, particularly those who may wish to seek the enforcement of an award made in a civil jurisdiction in a common law jurisdiction.

While the case involves complex factual and legal issues, the central issue before the CICA concerned whether the MP Funds could resist enforcement in the Cayman Islands of the award obtained by the Appellant, a Brazilian airline named Gol Linhas Aereas SA ("**Gol**"), in circumstances where the Brazilian courts had earlier dismissed objections by the MP Funds. The judgment addresses the roles of the arbitral tribunal, the supervisory court applying the law of the seat (in this case, that of Brazil) and of the enforcing court (here, the Cayman courts).

Background

The underlying claim by Gol, which was submitted in 2009 to an ICC arbitral tribunal seated in Sao Paulo (the "**Tribunal**"), sought an adjustment to the purchase price payable under a share purchase and sale agreement with various sellers concerning the sale of an airline (the "**PSA**"). The MP Funds (alleged to be the alter egos of the sellers, and to have fraudulently misused the sellers in the sale process) were not parties to the PSA, but were signatories to a separate "Non-compete Letter" annexed to the PSA in favour of the purchaser. The MP Funds disputed the Tribunal's jurisdiction from the outset, yet participated in the arbitration under protest.

Following the *competence-competence* principle – whereby an arbitral tribunal is deemed competent to determine its own jurisdiction – the Tribunal ruled in April 2009 that it had jurisdiction over the MP Funds with respect to the subject matter of the arbitration and rejected their jurisdictional challenge. In September 2010 the Tribunal then issued an award against the Sellers and the MP Funds jointly in the sum of R$92,987,672 (roughly US$16.5 million) (the "**Award**"). The Tribunal determined that the sellers' liability arose under the PSA's price adjustment provisions, whereas the MP Funds were held liable for tortious damages for third party malice under Article 148 of the Brazilian Civil Code, which neither party had pleaded and was not argued before the Tribunal.

In December 2010 the MP Funds commenced proceedings in the Brazilian Courts, seeking to annul the Award on the basis the Tribunal lacked jurisdiction (over the MP Funds, and over the relevant subject matter), and also on

due process and public policy grounds. The due process complaint was asserted on the footing that the Tribunal's reliance on Article 148 to establish liability occurred without warning to the MP Funds, depriving them of the opportunity to present any case against that distinct legal ground.

The due process challenge fundamentally concerned the application of the well-settled civil law doctrine *iura novit curia* ("*the court knows the law*") – a civil law principle well known in Brazilian law which allows the court or tribunal to adopt its own legal grounds for a decision, whether or not they were advanced by the parties. The doctrine is also described by the expression *da mihi factum et dabo tibi legem* (*"give me the facts and I will give you the law"*), which *prima facie* conflicts with the common law position requiring parties to plead their respective cases which are then the subject of argument before the court or tribunal.

The MP Funds' court challenge failed at first instance, and their appeal to the Sao Paulo Court of Appeals was dismissed in October 2012. The Court of Appeals held that the Tribunal was duly instituted, respected the right to an adversarial proceeding and that the MP Funds had sufficient opportunity to prove their factual case, whether or not the Award was based on legal grounds other than those argued or raised by the parties. It is against that background which GoI sought to enforce the award in the Cayman Islands, commencing enforcement proceedings in the Grand Court in October 2016. Following commencement of the enforcement proceedings, the MP Funds unsuccessfully pursued special appeals to Brazil's Supreme Court which were ongoing but considered unlikely to succeed.

Enforcement of foreign arbitral awards in the Cayman Islands

The foreign arbitral award enforcement regime established by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral was given domestic effect in the Cayman Islands by the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the "**Law**"). The Law confirms that all foreign awards will be enforceable in the Cayman Islands save where the limited exceptions prescribed in sections 7(2) and (3) apply. The exceptions include, *inter alia*, where the arbitration agreement was invalid, where the respondent was not given proper notice of the arbitration or was otherwise unable to present its case, or where the award deals with a difference not falling within the scope of the arbitration agreement. This mirrors the language used in the domestic laws of many other jurisdictions.

CICA Ruling

In considering whether to enforce the Award, and overturn the Grand Court decision, the CICA was required to consider *competence-competence* as well as the role of a foreign enforcing court where there has already been a challenge to the tribunal's jurisdiction or award before the supervisory court, applying the law of the arbitration seat.

The CICA held that "*the doctrine of competence-competence does not mean the exclusion of the courts, or that the courts are prima facie bound by the arbitrators' solution"* – the ability of a supervisory court or any enforcing court to re-examine *de novo* any challenge to jurisdiction is fundamental to international arbitration – however the consideration of an enforcing court may alter where an arbitral award has already been the subject of review or enforcement action before the supervisory court (the jurisdiction of which is never in question). In such a scenario, the CICA observed that the judgment of the supervisory court will have "*particular significance"* and that it was intuitively surprising that the Grand Court had differed from the Brazilian Courts on their findings

concerning Brazilian law.

The CICA went on to find that the opposition by the MP Funds to the enforcement of the arbitral award under the Law in the Cayman Islands concerned the very issues which were previously dismissed before the Brazilian Courts. The Brazilian judgments were, the CICA held, plainly the best evidence of the applicable Brazilian law and of how the Brazilian court would rule. The MP Funds were therefore estopped from challenging the Brazilian law decisions as to jurisdiction again before the Cayman Islands courts.

The CICA then turned to consider whether enforcement could be opposed on due process and public policy grounds. The CICA recognised that the due process and public policy standards to be tested are those of the enforcing court, however proper regard must be given to the views of the foreign court or foreign arbitral tribunal on any applicable foreign procedure (i.e. the widespread civil law doctrine of *iura novit curia*, which the CICA observed had not previously been rejected as being contrary to substantial justice under English or Cayman law). The CICA held that Mangatal J was mistaken to have disregarded the doctrine as falling outside of Cayman law considerations, and that it was proper for the Cayman courts to weigh it in support of enforcement, just as the Brazilian courts had done.

To sustain a due process challenge under English or Cayman law, substantial injustice must be proven. The English authorities confirm that only in extreme cases will the court's intervention be necessary to preserve the balance between upholding the finality of an award on the one hand and the need to protect against unfair conduct on the other. Significant weight was given by the CICA to the fact that the application of the *iura novit curia* doctrine had been considered by the Tribunal, the first instance Court of Brazil, the Court of Appeals of Sao Paolo, and the Supreme Court of Brazil without any adverse findings concerning due process. Sir Bernard Rix reflected that he was:

> *"… unable to condemn as unjust and against our own public policy a doctrine which is upheld in one of the great systems of law throughout the world, a fortiori when it has passed through the supervisory protections of the courts of the seat."*

Rix JA also observed that there could be no remission of the award by the enforcing court to the Tribunal where the matter had already been the subject of judicial scrutiny by the supervisory court. Against those findings, Gol's appeal was allowed and the Grand Court judgment was overturned. However, the enforcement action has been stayed in accordance with section 7(5) of the Law pending a final outcome of the Brazilian litigation.

Conclusion

As is frequently the case in international arbitration enforcement disputes, this judgment concerns the interaction between different legal systems and laws. This judgment helpfully clarifies the intersection between arbitral freedoms on the one hand, notably the principle of *competence-competence*, and judicial oversight of an enforcing court on the other. This judgment supports the view that the enforcing court has only a limited function aimed at promoting the finality of arbitral awards save for where substantial injustice has been proven in line with sections 7(2) and (3) of the Law.

The judgment is likely to dissuade award debtors from seeking to use the enforcement process in the Cayman

Islands as an opportunity to reargue a prior award, highlighting the inherent limitations with doing so at the enforcement stage, rather than via the supervisory court applying the law of the arbitral seat.

[1] Rix JA, with whom Goldring P and Martin JA agreed.
[2] Campbells' client advisory on the Grand Court J judgment, which provides further details concerning the complex and long-running background to this litigation, can be found here.

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