Privy Council upholds Cayman Court of Appeal decision to enforce foreign arbitral award in favour of Brazilian airline

A recent decision of the Privy Council has re-affirmed the narrow scope for challenging the enforcement of foreign arbitral awards. In a judgment delivered on 19 May 2022,[1] the Privy Council upheld the 2020 decision of the Cayman Islands Court of Appeal ("**CICA**") to allow an appeal against the February 2019 Grand Court judgment of Mangatal J 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) the arbitral award ruled on claims which fell outside the scope of the arbitration agreement and were neither pleaded nor argued before the tribunal. The Privy Council judgment confirms the policy factors that favour enforcement of arbitral awards and finality of rulings by the courts that have supervisory jurisdiction over the arbitration.

While the case is complex, the central issue concerned whether the MP Funds could resist enforcement in the Cayman Islands of the award obtained by a Brazilian airline named Gol Linhas Aereas SA ("**Gol**"), in circumstances where the Brazilian courts had earlier dismissed objections by the MP Funds.

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, but participated in the arbitration under protest.

Following the *competence-competence* principle, 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 (then 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 (importantly before the Cayman courts) 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 that 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.

[1] *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP and others* [2022] UKPC 21

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 constituted, that it 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 that 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 Awards is given domestic effect in the Cayman Islands by the Foreign Arbitral Awards Enforcement Act (1997 Revision) (the "**Act**"). The Act 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.

Privy Council Ruling

In determining whether to allow the appeal against the CICA's decision, the Privy Council was required to consider three main issues: first, the validity of the arbitration agreement; secondly, whether there was a serious failure by the Tribunal to follow due process; and thirdly, whether enforcement should be refused on the grounds that the Award went beyond the scope of the submission to arbitration. The Privy Council judgment was delivered jointly by Lord Hamblen and Lord Leggatt, with whom Lord Kitchen, Lord Lloyd-Jones and Sir Julian Flaux agreed.

Issue One: Validity of the arbitration agreement

The Privy Council upheld the CICA's decision that the judgments of the Brazilian courts – having supervisory jurisdiction over the arbitration seated in Sao Paulo – gave rise to an issue estoppel, whereby the validity of the arbitration agreement had already been determined conclusively in favour of GoI and could not be re-opened before the Cayman courts, and so this ground of appeal was dismissed.

Issue Two: Due process

The second ground on which the MP Funds resisted enforcement of the Award was that the Tribunal allegedly committed a serious breach of natural justice or due process by finding the MP Funds liable on a legal basis not raised by GoI without giving the MP Funds an opportunity to be heard on the point. The MP

Funds said that this meant they were "*unable to present [their] case*", such that a defence to enforcement arose under article V(1)(b) of the New York Convention, and that enforcement should also be refused under article V(2)(b) on the basis that, by reason of the alleged breach of natural justice, it would be contrary to the public policy of the Cayman Islands to enforce the Award.

In dismissing this ground of appeal, the Privy Council determined, first, that the meaning and effect of article V(1)(b) was a question of Cayman Islands law, as the New York Convention does not have direct effect, but rather is given effect by the Act. However, the Privy Council held, it does not follow that the question is to be answered by applying domestic standards of what constitutes a fair procedure. Rather, as with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin as an international instrument intended to have an international currency. It follows that the court should regard the domestic statutory provision as imposing a standard of due process capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants.

Without seeking to identify a *"lowest common denominator of standards required by national systems",* the court should be *"seeking to identify and apply basic minimum requirements which would generally, even if not universally, be regarded throughout the international legal order as essential to a fair hearing."* The Privy Council held that there can be *"no doubt that they include a requirement that the tribunal must give both parties an opportunity to adduce evidence and put forward arguments on the matters in dispute. A corollary of this is that the tribunal should not reach its decision on a basis which the party adversely affected by the decision has had no opportunity to address."*

However, in this case, the Tribunal had not reached its conclusion based on any facts which were not either admitted or in issue in the arbitration. The Tribunal had simply applied its own analysis of the legal consequences, in terms of liability, resulting from the established facts. Therefore, although it would have been prudent for the Tribunal to have given the parties an opportunity to comment upon its intended findings, as the Tribunal was contemplating the application of legal concepts not argued by the parties, there was nonetheless no serious denial of procedural fairness such as to justify a refusal to enforce the Award.

As to matters of public policy, the Privy Council affirmed both the public policy in favour of enforcing arbitral awards and the public policy in favour of sustaining decisions taken by the supervisory courts; in this case, the courts of Brazil, which had already ruled upon the question of procedural fairness. In conclusion, the Privy Council held that *"[i]t would be a very strong thing for an English or Cayman court to find it contrary to the public policy of the forum to enforce an award which has been upheld by the courts with primary responsibility for ensuring the integrity of the arbitral process. There is no sufficient basis on which to reach such a conclusion in this case."*

Issue Three: Scope of submission to arbitration

The Privy Council dealt only briefly with the third and final issue, namely whether enforcement should be refused under article V(1)(c) of the New York Convention (mirrored in section 7(2)(d) of the Act), as it found that there was a substantial overlap between this issue and the other issues already considered. The Privy Council concluded that there was no basis for enforcement to be refused on this basis, and therefore this ground of appeal was also dismissed.

Conclusion

This judgment reaffirms as a matter of Cayman law the orthodox view that the enforcing court has only a limited function aimed at promoting the finality of arbitral awards, and that awards will readily be enforced in the Cayman Islands in almost all cases.

By Andrew Pullinger and Shaun Tracey