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ARE SHAREHOLDER DISPUTES IN CAYMAN IS. ARBITRABLE?

In the July and October 2020 editions of **The CIArbbean News** *(Vol. 1 Nos. 12 and 13), an article, in two parts, reviewed the decision made, in the first instance, by the Grand Court of the Cayman Islands and, on appeal, overturned by the Cayman Islands Court of Appeal, in the case regarding CVS (Cayman Islands) Holding Corp. and a share-holder's petition to wind up that company.*

This article previews the appeal of the Cayman Islands Court of Appeal decision before the Judicial Committee of the Privy Council, the final appellate court of the Cayman Islands.

Later this month, on 15 and 16 November 2022, the Judicial Committee of the Privy Council is scheduled to hear an important appeal from the Cayman Islands Court of Appeal (**CICA**), relating to the arbitrability of shareholder disputes involving Cayman Islands companies and, in particular, shareholders' petitions for the compulsory winding up of a solvent company on 'just and equitable' grounds.

The appeal is of public importance, and it should be of interest to the members of the **CIArb** Caribbean Branch for at least two reasons.

Firstly, the Privy Council is scheduled to be physically sitting in the Cayman Islands for the hearing of the appeal (as well as hearing two other pending appeals from CICA in the same session).

Secondly, the appeal presents the first opportunity for a final appellate court, such as the Privy Council, to consider arguments relating to the arbitrability of shareholder disputes in some detail, having regard not only to Cayman Islands law, but also comparative jurisprudence from other common law jurisdictions, including a number of pro-arbitration decisions of the Court of Appeal of England and Wales.

Given the fact that Privy Council decisions are treated as either binding, or highly persuasive, in a number of common law jurisdictions, this appeal has the potential to promote, or to undermine, the arbitrability of a large number of corporate shareholder disputes, not only in the Cayman Islands, but in a number of different jurisdictions.

The case, in question, scheduled to be heard by a panel of judges including Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Briggs and Lord Kitchin, is *Ting Chuan (Cayman Islands) Holding Corporation v FamilyMart China Holding Co Ltd*, JCPC, 2020/0055, which can be found on the Privy Council's website https://www.jcpc.uk/cases/jcpc-2020-0055.html.

By way of a very brief summary of the background facts to the appeal, CVS (Cayman Islands) Holding Corp is a company incorporated in the Cayman Islands (**the Company**) and the ultimate owner of a business comprising some 2,400 convenience stores in China.

The Appellant (**Ting Chuan**) owns 59.65% of the shares of the Company and the Respondent (**FamilyMart**) owns the remaining 40.35%. Ting Chuan and FamilyMart are parties to a shareholder agreement which contains an arbitration agreement.

On 12 October 2018, FamilyMart presented a shareholder's petition to wind up the Company, complaining about Ting Chuan's conduct of the Company's affairs. Ting Chaun applied to strike out this petition on the ground that any disputes should be resolved by arbitration.

The Grand Court of the Cayman Islands (Mr. Justice Kawaley) dismissed the strike out application in 2019, but ordered the petition be stayed until the complaints in the petition had been arbitrated.

The Cayman Islands Court of Appeal (Moses JA, Martin JA and Rix JA) allowed FamilyMart's appeal in 2020, holding that no part of the petition was arbitrable.

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Having reviewed the facts of the case, the relevant winding-up provisions of the Cayman Islands' Companies Act, and various lines of authority at common law, CICA held that "*where the underlying issues are central and inextricably connected to determination of the statutory question whether the company should be wound up on just and equitable grounds, the possibility of hiving off those issues becomes more difficult … in order to determine the threshold issue as to whether there are sufficient grounds to justify winding up on just and equitable grounds, the court must evaluate all the circumstances of the case*".

CICA noted, in particular, that English Court of Appeal cases such as *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 could be distinguished, because in those sorts of cases, the courts had not needed to consider relief that invoked the "*exclusive jurisdiction of the court, namely whether the company should be wound up*".

Ultimately, the appeal in this case reflects an inherent tension between the statutory winding up provisions of the Cayman Islands' Companies Act on the one hand, and the pro-arbitration provisions of the Cayman Islands' Arbitration Act and the Foreign Arbitral Awards Enforcement Act on the other hand.

It will no doubt take a degree of careful reasoning (or mental gymnastics) on the part of the Privy Council to reconcile the two sets of conflicting, public policy considerations, that inform the two sets of statutes.

Since predicting the future is a fool's errand, there is probably little benefit in this author trying to predict the decision of the Privy Council. I would simply venture to suggest that the case will be one worth watching, whether in person or on the Privy Council's live-stream on its website.

The eventual outcome, and the Privy Council's judgment in due course, should be of significant interest to anybody with a legal, commercial, professional, or academic interest in the resolution of corporate disputes in common law jurisdictions, whether by way of Court proceedings, or by way of arbitration, or by some hybrid combination of the two sets of procedures.

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HAVE YOUR SAY

Readers are encouraged to share their views and comments on the newsletter and its content, and to promote and sustain its growth by submitting original papers, views, opinions or information on related items of interest for publication in future editions.

The newsletter is published on a quarterly basis and readers should submit their papers, views, comments and information by e-mail to info@ciarbcaribbean.org

There is no word limit on the articles submitted but where it becomes necessary to edit any lengthy submission for publication, then the edited article is published in the newsletter, in whole or in parts, and the full unedited submission is published on the **CIArb** Caribbean Branch's webpage at www.ciarbcaribbean.org.

YES TO CHANGE

Members attending the **CIArb** Extraordinary General Meeting on 29 September 2022 voted overwhelmingly in support of plans to amend the Institute's Royal Charter and Bye-laws. The changes are intended to bring **CIArb**'s governance in line with best practice and help it to continue to meet and support its members' needs.

Subject to approval by the Privy Council, the changes will also introduce a new Chartered Adjudicator designation for **CIArb**'s most experienced adjudicator members and **CIArb** stands to become the first and only professional body with the power to award Chartered Adjudicator (C.Adj) status. It is anticipated that C.Adj will command the same level of respect and recognition internationally as the well-established C.Arb designation.

TRAINING DIARY

Registrations for all courses in the **CIArb** Caribbean Branch's online training programme for 2022 are now closed. The *Module 1 – Law, Practice and Procedure in International Arbitration* course is ongoing with 26 candidates from seven countries, including Haiti and the Dominican Republic.

The training of the candidates from Haiti and the Dominican Republic is being facilitated by funding from the trade component of the 11th European Development Funds' Haiti-Dominican Republic Bi-national Programme, being executed by the Caribbean Export Development Agency and follows consultation between the **CIArb** Caribbean Branch, the Chamber of Conciliation and Arbitration of Haiti and the Centre for Alternative Dispute Resolution of the Chamber of Commerce of Santo Domingo.

ENFORCING AN ARBITRAL AWARD – GOL v MP FUNDS

In the January 2021 edition of **The CIArbbean News** *(Vol. 1 No. 14), an article bearing the same title as this article was published; and in which the authors reviewed the Cayman Islands Court of Appeal 2020 decision in Gol v MP Funds, addressing the roles of the arbitral tribunal, the supervisory court applying the law of the seat and the enforcing court with regard to an arbitral award that was made in a civil law jurisdiction and was being enforced in a common law jurisdiction. The 2020 Court of Appeal decision was subsequently appealed before the Judicial Committee of the Privy Council, the final appellate court of the Cayman Islands, and this article reviews the outcome of that appeal.*

The previously published article gave the details of the underlying claim by Gol submitted in 2009, the award made in favour of Gol by the arbitral tribunal seated in Sao Paulo in 2010, MP Funds' failure to have the award annulled at the seat at first instance and on appeal having the challenge dismissed by the Sao Paulo Court of Appeals in 2012, Gol's failure to have the award enforced at first instance by the Grand Court in the Cayman Islands in 2019 and then having the Court of Appeal allow their appeal in 2020 overturning the Grand Court judgment.

The Privy Council Upholds Decision

In the case of *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP and others* [2022] UKPC 21, the Privy Council in a judgment delivered on 19 May 2022 upheld the 2020 decision of the Cayman Islands Court of Appeal (**CICA**) to allow an appeal against the February 2019 Grand Court judgment (Mangatal J) which refused to enforce a decade-old Brazilian arbitral award on the grounds that, *inter alia*, (i) the Defendants (**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 arbitral tribunal.

The decision of the Privy Council to uphold the CICA decision has re-affirmed the narrow scope for challenging the enforcement of foreign arbitral awards and 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 MP Funds could resist enforcement in the Cayman Islands of the award obtained by the Claimant, Gol Linhas Aereas SA (**Gol**), a Brazilian airline, in circumstances where the Brazilian courts had earlier dismissed objections by MP Funds.

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 CICA's decision, the Privy Council was required to consider three main issues: firstly, the validity of the arbitration agreement; secondly, whether there was a serious failure by the arbitral 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.

Validity of the arbitration agreement

On the first issue, the Privy Council upheld 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 Gol and could not be re-opened before the Cayman courts, and so this ground of appeal was dismissed.

Due process

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

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

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ENFORCING AN ARBITRAL AWARD – GOL v MP FUNDS

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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 arbitral tribunal had not reached its conclusion based on any facts which were not either admitted or in issue in the arbitration. The arbitral 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 arbitral tribunal to have given the parties an opportunity to comment upon its intended findings, as the arbitral 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."*

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.

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The full unedited article may be found on the **CIArb** Caribbean Branch's website www.ciarbcaribbean.org under the 'More Newsletters and Articles' tab.

A MEMBER PASSES

It is with sadness and regret that **The CIArbbean News** advises readers of the passing of **CIArb** Member, Jefferson Oliver Reeves who resided in Barbados. Mr. Reeves was a retired central banker and a **CIArb** member since 2003. On behalf of the membership of the Branch, **The CIArbbean News** extends sympathy to his family and friends. May He Rest In Peace.