

## Enforcement of foreign arbitral awards in Bermuda

Chief Justice underlines the jurisdiction's pro-enforcement stance in notable recent judgment

Service area / [Dispute Resolution and Litigation](#)

Location / [Bermuda](#)

Date / [September 2019](#)

### What has happened?

In a judgment handed down on 3 September 2019 in the case of *Cat.SA v Priosma Limited*<sup>1</sup>, the Bermuda Supreme Court:

- refused an application by the Bermuda-based Priosma Limited (**Priosma or Award Debtor**) to set aside an *ex parte* order granting Cat.SA (**CAT or Award Creditor**) leave to enforce a foreign arbitral award rendered in an arbitration seated in Paris (**Set Aside Application**);
- granted Priosma's application for a stay of enforcement in Bermuda pending the outcome of an appeal by Priosma against the award to France's highest appellate court (**Stay Order**); and
- as a condition of the Stay Order, ordered Priosma to provide security for the full amount of damages and costs awarded to CAT by the three-member tribunal in Paris.

### Why is the case noteworthy?

The judgment once again confirms Bermuda's status as a sophisticated, arbitration-friendly jurisdiction. It serves as a classic example of the robust approach taken by the Bermuda courts when asked to enforce foreign arbitral awards against award debtors in Bermuda, even in circumstances where the award in question is being challenged by the award debtor in the courts of the "seat", or legal place, of the arbitration.

The judgment of the Chief Justice of Bermuda, Mr Narinder Hargun, expressly states that the decision is "consistent with the pro-enforcement policy" of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**New York Convention**), which was given legal effect in Bermuda in 1979, as well as the Bermuda International Conciliation and Arbitration Act 1993 (**1993 Act**) which incorporates the UNICITRAL Model Law into Bermuda law.

On a more technical level:

- The judgment stands as good authority for the principle that, pursuant to the legal doctrine of issue estoppel, the Bermuda courts will not allow an award debtor to re-litigate arguments in support of non-enforcement of a foreign award if those arguments have already been made before, and rejected by, the supervisory courts of the arbitration.
- The judgment makes it clear that even if award debtors are successful in persuading the Bermuda courts to stay enforcement pending a legal challenge in the courts of the foreign seat, there is nevertheless a real possibility that the award debtor may be required, depending on the circumstances, to provide security as a condition of any order granting a stay (potentially up to the full value of the award).

<sup>1</sup> [2019] SC (Bda) 56 Com.

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## Brief facts

CAT, a member of a French group of (re)insurance companies, commenced an arbitration against Priosma, a Bermudian reinsurance broker, in Paris pursuant to an arbitration agreement annexed to a brokerage agreement. CAT's claim concerned the non-payment of sums it alleged were due to it from Priosma under the brokerage arrangements between the parties.

The subsequent arbitral proceedings in Paris were fully contested by Priosma, which as part of its defence contested the jurisdiction of the tribunal to decide CAT's claim on the grounds that there was no valid and binding arbitration agreement in place between CAT and Priosma (the **Jurisdictional Objection**).

The arbitral tribunal rejected the Jurisdictional Objection and proceeded to decide the merits of the substantive dispute in CAT's favour. Priosma was ordered to pay CAT the sum of €556,958 along with interest from the date of the award.

On 10 June 2016 Priosma appealed against the award to the Paris Court of Appeal, once again relying on the Jurisdictional Objection. The Paris Court of Appeal dismissed Priosma's appeal, and on 24 September 2018 Priosma issued a further appeal to the Cour de Cassation.

This appeal was pending when the Set Aside Application was heard by Bermuda Supreme Court.

## Key conclusions and principles

- The grounds of the Set Aside Application were identical to the grounds relied on by Priosma before the Paris Court of Appeal. The latter court having rejected those arguments, the doctrine of issue estoppel prevented the Bermuda court from entertaining those same arguments in its proceedings. In short, the Chief Justice concluded that he was bound by the Paris Court of Appeal's ruling.
- The fact that Priosma had commenced court proceedings in France to challenge the award meant that Priosma had voluntarily submitted to the jurisdiction of the French courts, and therefore an essential condition under Bermuda law for issue estoppel to apply in the context of a ruling of a foreign court was made out.

- The Bermuda court's power to grant a discretionary stay of enforcement of a foreign award pending the outcome of a challenge to the award in the courts of the seat derives from Section 36(2) of the 1993 Act. When deciding whether to exercise its discretion to stay enforcement, the Bermuda Court will apply the "sliding scale" test set out in the foundational and long-running English case of *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation*<sup>2</sup>.
- As such, the Bermuda court will consider a number of relevant factors when deciding to grant a stay of enforcement, including whether the challenge in the courts of the seat is brought *bona fide* and not simply by way of a delaying tactic, whether the challenge has a realistic prospect of success, the extent of any delay which would be occasioned by a grant of a stay and any resulting prejudice to the award creditor.
- In deciding whether to order the award debtor to provide security as a condition of granting a stay of enforcement, the Bermuda Court will consider
  - a. the strength of the argument that the award is invalid (as perceived on a brief consideration of the award debtor's arguments in the foreign proceedings); and
  - b. whether enforcement will be rendered more difficult for the award creditor if enforcement is delayed<sup>3</sup>.

<sup>2</sup> [2005] EWHC 726 (Comm).

<sup>3</sup> Applying *Soleh Boneh International Ltd v Government of Republic of Uganda*. [1993] 2 Lloyd's Rep 208.

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