



The CI Arb News

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JOHN BASSIE ELECTED CI Arb VICE-PRESIDENT 2021

In the July 2020 edition of this newsletter, readers were advised of the candidacy of Mr. John Bassie of Jamaica for the **CI Arb** Presidential Elections. Mr. Bassie, the founding member and first Chairman of the Caribbean Branch, was nominated by the Branch as its candidate, having been elected unopposed by the membership at its Annual General Meeting in April.

The Presidential Elections were held on 10 November 2020 at the online biennial **CI Arb** Congress and **The CI Arb News** is pleased to announce that Mr. Bassie was successful in being elected, by the global Branch Chairs attending the Congress, as the Vice-President of **CI Arb** for 2021.

Under the Rules of the Institute, by his election to the office of Vice-President in 2021, Mr. Bassie will assume the role of Deputy President in 2022 and the role of President of **CI Arb** in 2023.

In congratulating him on the achievement, **The CI Arb News** interviewed Mr. Bassie, first asking him to sum up what the election means to him personally, and what does he see it meaning for the Caribbean Branch?

JB: First, let me wish the readers all the best in the new year and thanks for the opportunity to engage with them through this medium.



I am deeply appreciative of this opportunity to serve in a position of leadership and I am mindful of the responsibility that accompanies it. This is a milestone that I feel I have been in preparation for during the last twenty-five years. The lessons that I have learnt along the way have culminated in the successes within the Chapters and have greatly contributed to the overall accomplishments of the Branch.

This honour allows me to promote 'Access to Justice For All', which is long-held personal goal.

I believe this window will give the Branch the opportunity, through the position, to show how diverse the Caribbean region is, whilst we are, unequivocally and universally,

committed to our shared objective of 'Access to Justice for All'

Q: You have been one of the pioneers of ADR in the Caribbean region; how do you see the Presidency of **CI Arb** being leveraged for even greater awareness and success of ADR in the region?

JB: One of the great lessons that I learnt whilst assisting to build the Chapters to form our Caribbean Branch was the unique strengths found within the Chapters and how they contributed to the overall success of the Branch. In fact, it would be remiss of me not to say that even our weaknesses have assisted us on the path to success.

It is my intention to invite the global family of the **CI Arb** to our region to experience and showcase our islands, to show what we have to offer and to show off our hospitality. In fact, our unique approach to ADR intertwined with our love for humanity is certainly reflected in our style of ADR.

I intend to mark the start of my year as President in 2023 with a gala affair in our region which hopefully will be attended by the Branch Chairs and members from across the globe and allow them to experience our region's hospitality. This will provide a unique opportunity for the Chapters to show the best of our region.

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INTERVIEW WITH VP JOHN BASSIE (Continued from page 1)

Q: You canvassed for the Presidency using a manifesto theme of 'Adapt, Collaborate, Engage and Educate'. Can you share with our readers the main thrust of this theme and why you adopted it?

JB: I have always been one willing to discuss the uses and growth of ADR. One of my dear friends and ADR colleagues, Dr. Zaza Elsheikh, has advocated the 'Adapt, Collaborate and Engage' (ACE) method and during our discussions about **CIArb's** vision, we realized that we ought to include 'Educate' as a crucial component of the methodology, hence the acronym ACEE – 'Adapt, Collaborate, Engage and Educate', which would greatly assist on this path.

The path that I refer to is the approach to increasing 'Access To Justice For All' regionally and by extension globally. I felt that this approach is one that could be adapted and tailored to any situation in all jurisdictions.

Further, I felt it was necessary for organizations and individuals to immediately start by reviewing their separate challenges and successes in their own jurisdictions. For example, the Dispute Resolution Foundation of Jamaica, the organization which originally hosted the **CIArb** in the Caribbean in 2007, has started along this path with Jamaica Aids Support for Life (JASL) using a training program it has designed and delivers. This is just one example where like-minded organizations are providing boutique ADR solutions for unique situations.

Q: The **CIArb** Strategic Plan 2021 – 2023 focuses on promoting the constructive resolution of disputes, thought leadership in influencing

the shape of dispute resolution and supporting its members' inclusive career progression. What are the key aspects of this global strategy that you see most beneficial to the region?

JB: The **CIArb** Strategy 2021 – 2023 is committed to promoting effective dispute resolution and the benefits it brings to society and economies across the world. The Strategy anticipates that through a commitment to effective dispute resolution, it will ultimately enable the organization to realize **CIArb's** vision of a world where disputes are resolved promptly, effectively and creatively.

It further envisions delivery on **CIArb's** mission to be the inclusive global thought leader on dispute resolution. This will be accomplished by promoting and facilitating the creative and effective resolution of disputes, whilst in the process of supporting equality, diversity, and inclusion. **CIArb** further plans to continue to ensure that practitioners are highly trained and comply with professional standards and ethical rules.

The **CIArb** Strategy 2021 – 2023 strategy has been developed by the organization's Trustees in consultation with the Branches, the members, and staff. It is expected that by delivering the strategic aims, the **CIArb** will move closer towards achieving the vision and delivering on the mission.

The Strategic Aims seek to "globally promote the constructive resolution of disputes; be a global, inclusive thought leader and develop and support an inclusive global community of diverse dispute resolvers."

This Strategy outlined by our organisation dovetails perfectly with the 'Adapt, Collaborate, Engage and Educate' approach which takes the outlined strategies and allows them to be adapted and critically implemented on the ground in any jurisdiction.

By implementation of the Strategy, this will immediately allow for the promotion of the resolution of disputes and further, by definition, it will encourage members to collaborate with like-minded persons and organizations at the local and regional level. The approach then allows partnering between parties as it engages and shares through the mutual education of those parties involved and through the sharing of best practices.

The Caribbean Branch embodies the true spirit of our region. Our growth can be attributed in some way to the use of this approach, formally and informally. It is our love for our societies that has allowed us to recognize our differences and seek to grow stronger in our diversity.

The **CIArb** Strategy 2021 – 2023 allows us to further grow in our region on a path that we have already embraced and in which we have blazed a trail. Already our fledgling Branch has yielded The Bahamas Branch, a sister Branch, that embraces our path as we embrace hers and this can only bode well for our region.

It is this unity and foresight that will sustain our vision and ensure that we will have 'Access To Justice For All'. This is critical for the survival and growth of our Caribbean region. The Caribbean Branch's contribution to ADR is fundamentally important to the region's justice systems.

ENFORCING AN ARBITRAL AWARD – GOL v MP FUNDS

This article reviews a recent Cayman Islands Court of Appeal judgment which addresses the roles of the arbitral tribunal, the supervisory court applying the law of the seat and the enforcing court, and will be of interest to users of international arbitration, particularly those seeking, in a common law jurisdiction, enforcement of an award made in a civil law jurisdiction.

The Arbitral Process and Award

In 2009, the claimant, a Brazilian airline named Gol Linhas Aereas SA (Gol), submitted a claim to an ICC Arbitral Tribunal, seated in Sao Paulo, Brazil, seeking an adjustment to the purchase price payable under a share purchase and sale agreement (the PSA) with various sellers concerning the sale of an airline.

One of the respondents, 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.

MP Funds disputed the Tribunal's jurisdiction from the outset, yet participated in the arbitration under protest. The Tribunal, following the *competence-competence* principle, whereby an arbitral tribunal is deemed competent to determine its own jurisdiction, ruled that it had jurisdiction over MP Funds with respect to the subject matter of the arbitration and rejected MP Funds' jurisdictional challenge.

In September 2010, the Tribunal issued an Award against the sellers and MP Funds jointly in a sum approximately equivalent to US\$16.5 million. The Tribunal determined that the sellers' liability arose under the PSA's price adjustment provisions, whereas 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.

Application to Set Aside the Award

In December 2010, MP Funds commenced proceedings in the Brazilian Courts, seeking to annul the Award on the basis that the Tribunal lacked jurisdiction over 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 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 of *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 court challenge by MP Funds 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 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.

Application to Enforce the Award

Against that background, Gol sought to enforce the Award in the Cayman Islands, commencing enforcement proceedings in the Grand Court in October 2016. Subsequently, MP Funds pursued special appeals to Brazil's Supreme Court which are ongoing but considered unlikely to succeed.

The foreign arbitral award enforcement regime established by the 1958 New York Convention was given domestic effect in the Cayman Islands by the Foreign Arbitral Awards Enforcement Law (1997) (the Law) and 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.

In February 2019, the Grand Court refused to enforce the then decade-old Brazilian arbitral Award on the grounds that, *inter alia*, (i) 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 Appeal and The Ruling

While the case involved complex factual and legal issues, the central issue before the Cayman Islands Court of Appeal (CICA) concerned whether MP Funds could resist enforcement in the Cayman Islands of the Award obtained by Gol, in circumstances where the Brazilian courts had earlier dismissed objections by MP Funds.

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ENFORCING AN ARBITRAL AWARD (Continued from page 3)

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 had 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).

The CICA observed that, in such a scenario, the judgment of the supervisory court will have "particular significance" and 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 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, the CICA held, were plainly the best evidence of the applicable Brazilian law and of how the Brazilian court would rule.

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 Islands law).

The CICA held that the Grand Court was mistaken to have disregarded the doctrine as falling outside of Cayman Islands law considerations and that it was proper for the Cayman Islands 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 Islands 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 Paulo, and

the Supreme Court of Brazil without any adverse findings concerning due process.

CICA's Sir Bernard Rix JA 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." He 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 legal systems and laws and helpfully clarifies the intersection between arbitral freedoms on the one hand and judicial oversight of an enforcing court on the other. It is likely to dissuade award debtors from seeking to use the enforcement process in the Cayman Islands as an opportunity to re-argue a prior award.

*Submitted by
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The full unedited article and a copy of the CICA judgment may be found on the **CIArb** Caribbean Branch's website: www.ciarbcaribbean.org

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